Taking Revenge for Dissent

Hungary's Chief Justice to Fully Eliminate Judicial Autonomy

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Hungary's latest judicial reform in May 2023 came in response to EU decisions to suspend the country's access to funds due to serious rule of law concerns. The reform aimed, among other things, to strengthen the independence of the Kúria, the Supreme Court of Hungary. Experience to date shows that while on the level of formal legal rules, some improvements towards the rule of law have been made, in actual daily practice, the opposite is happening.

The Hungarian regime, which is built on the idea of "ruling by cheating", never intends to fulfil its promises effectively. Also, as it is becoming more autocratic, it seeks to signal internal strength while under pressure from the outside to discourage any potential future dissent. The pattern is clear: after substantial concessions are made under EU pressure, a domestic measure counteracts it to undermine the reform. In this instance, it means that while steps have been taken to restore the independence of the Kúria, the Chief Justice is working on further eroding the independence of individual judges. This time, by dissolving, without reasonable grounds, a judicial panel that rendered decisions detrimental to the government. In this blog, I will argue that this move could get the Kúria into trouble before European courts.

A Partially Captured Institution: the Kúria

In the early 2010s, the Orbán government aimed to disempower the Kúria. These steps included the premature termination of Chief Justice András Baka's mandate (that was found illegal by the ECtHR), the forced retirement of about a third of the Kúria's judges (that was found illegal by the ECJ) and placing the Kúria under the supervision of the packed Constitutional Court *via* the newly introduced constitutional complaint mechanism. As part of this project, the government was prepared to set up a separate system for administrative justice, with a Supreme Administrative Court acting as a court of last instance in administrative lawsuits. Making the unified judicial system a fragmented one would have entailed the curtailment of the Kúria's competencies by transferring politically sensitive administrative cases to a new high court. In late 2019, however, the government retreated from this plan. This also marked a new era of judicial politics regarding the top court of Hungary. The previous policy of judicial disempowerment was replaced by a new trend of empowering the Kúria. The main instrument of this process, the so-called *limited precedent system*, has made the Kúria's judgments binding for lower courts. At the same time, the government made important steps to pack the top court with loyal judges. Court-packing culminated in the election of the new Chief Justice, András Zs. Varga, who arrived at the Kúria without previous judicial experience as a result of a series of ad hominem legislation. Ever since he took office, he has been serving the interests of the executive as the highest court official in all aspects: as a presiding judge in administrative cases and the new uniformity complaint panels, when appointing judges and court executives and determining the rules for case allocation, and also when speaking out in public in his representative capacity.

Notwithstanding these developments, the remnants of judicial autonomy have never disappeared, and some judges, even today, are willing to challenge the regime through their individual judgments when legal arguments and professional-ethical standards of judging require this. The jurisprudence of a judicial panel, namely Panel II in the administrative department of the Kúria, reflects this assertiveness. But recently, the Chief Justice has decided to dissolve

this entire panel and transfer its judges to various other panels just to put the recalcitrant judges under control.

Judicial Dissent on the Bench

In recent years, Panel II found on several occasions against the government in electoral and referendum cases. In 2021, in the face of fierce international criticism over the newly adopted anti-LGBTQ+ law, the government proposed a referendum to obtain popular authorization for disregarding international human rights standards. The referendum covered five vaguely formulated, manipulative questions seeking to amplify homophobic and transphobic public sentiments. Panel II refused to validate one of the five questions, namely: "*Do you support making gender reassignment treatments available also for minors?"* Shortly afterwards, all the other four questions were given the green light by other panels of the Kúria, while the Constitutional Court struck down the judgment of Panel II.

During the 2022 election campaign, the government misused voters' personal data by sending campaign messages to email addresses previously collected for Covid-related official communication. These messages contained false accusations about the opposition's stance on the Russian invasion of Ukraine. They claimed that the opposition would have sent troops to Ukraine. Panel II concluded that the government's newsletter was unlawful as it overstepped the legitimate boundaries of official government communication. However, similarly to the previous case, the Constitutional Court annulled the judgment.

More recently, Panel II has been confronted with the panel presided over by the Chief Justice when both adjudicated on referendum disputes. The decisions reflected a serious disagreement over the standards of judicial review on the admissibility of referendum questions. Panel II relied on a permissive approach to initiating referenda, thereby protecting an important political right of individuals. At the same time, the Chief Justice's judicial panel established some novel standards for strict scrutiny over referendum questions, giving grounds for effectively blocking all initiatives seeking to challenge government policies of great importance. In the latter case, the judges prevented the use of direct democracy to stop the construction of new Chinese battery factories on Hungarian territory, a priority of the Orbán government's economic policy.

In other fields, such as competition law, environmental law, and immigration policy, Panel II has established an EU-law-friendly approach, which, on some occasions, entailed setting aside Hungarian law to enforce EU law provisions. In 2023, in a follow-up decision of the judgment of the Court of Justice of the European Union (CJEU) in case C-528/21, Panel II found the relevant EU directive directly applicable, requiring the Hungarian Immigration Authority to give due consideration to the individual circumstances of a third-country national (his state of health and his family life, including the best interests of his minor child) before making a return decision based on national security concerns (Kfv.II.37.292/2023/6). Also, in a case on the withdrawal of a national residence permit, Panel II stayed the main proceeding on the ground that questions related to the same legal issue had already been referred to the CJEU by a lower court (Kfv.II.37.642/2022/15). Contrary to this, in a similar case (Kfv.VII.37.517/2023/12), the Chief Justice's judicial panel decided on the basis of the Hungarian legislation, finding it in full compliance with EU law.

Punishment for Dissent: Proposal to Dissolve Panel II via Amendment to the Case Allocation Scheme

In October 2023, Chief Justice Varga proposed changes to the case allocation scheme of the Kúria. It is the case allocation that determines the number and composition of judicial panels. According to his plan, Panel II will cease to exist in its current form, and the judges will be transferred to various other adjudicating panels of the administrative college of the Kúria. The official reason for dissolving Panel II is to fill vacant judicial offices in Panel I, where two judges will retire in early 2024.

As a general rule, administrative lawsuits are heard by five-judge panels in the top court, and both Panel I and Panel II consist of five judges. Against the abovementioned background, the genuine reason for

dissolving Panel II, a full and well-functioning panel, appears to be the content of the decisions the panel has made. All other explanations seem unreasonable. Also, in 2024, two elections will be held in Hungary, so any judicial dissent in electoral cases would be particularly inconvenient for the Chief Justice.

The reform of the case allocation scheme has become part of the negotiations between the Hungarian government and the European Commission over access to EU funds. International institutions and domestic watchdog bodies have long criticized the lack of a transparent and foreseeable system for allocating cases to judicial panels, especially regarding the Kúria. The established system not only jeopardised the right to a fair trial but was also detrimental to judicial autonomy. Without clearly defined, pre-determined standards for case allocation, the system has been exposed to undue human intervention and eventually to undue influence, namely the influence of the Chief Justice over the outcome of individual cases. Recalcitrant judges can have legitimate fears that if they fail to live up to political expectations, they will not be adjudicating high-profile cases. Some judges even raised their concerns publicly about the case allocation system in the Kúria. They argued on Verfassungsblog that neither the way cases were assigned to judicial panels nor the final composition of the panel hearing the case was foreseeable. One of the authors sits on Panel II as a presiding judge.

The 2023 justice reform adopted by the government under EU pressure, however, envisaged a new, de facto automated case allocation regime in the Kúria. It also provided new safeguards against the possible manipulation of case allocation. Judicial bodies, namely the local judicial council and the competent department of judges, have been given the right to consent to the rules of case allocation, while parties to the proceeding can now verify whether the rules for case allocation have been properly applied. However, the system still lacks foreseeability and provides ample grounds for manipulation. Nevertheless, the Chief Justice continues to misleadingly claim that the Kúria complies and has already, for some time, complied with the new rules determined by the justice reform.

Violation of the Irremovability of Judges?

Autonomy in judicial decision-making is least tolerated in politically sensitive cases by autocratic governments. Despite all efforts to weaken judicial autonomy, some Hungarian judges have rendered brave rulings in cases of great importance to the government.

The decision of the Chief Justice to dissolve a full judicial panel seems to be a strong response to dissent. His move, however, is wrapped up in the amendment of the case allocation scheme, and he seems to have succeeded in gaining the support of the majority of judges for his plan. However, having a majority does not mean that the judges concerned had themselves consented to the transfer. Moreover, in the case at hand, the vote on the case allocation scheme was not treated as a personnel issue, so an open vote took place. This could have discouraged judges from voting down the Chief Justice's proposal.

While the demands of the European Commission indeed brought about important measures to improve the transparency of case allocation and pushed through new built-in checks, the current story shows there are further grounds to influence the way cases are assigned to judges. This could not only incapacitate the respective judges but could have a chilling effect on all judges sitting on the top court. Judges are strategic actors and likely to retreat from direct confrontation in their judgments if their judicial career within the Kúria may be put at risk.

The transfer of judges from one panel to another without reasonable grounds and the explicit consent of the judges concerned may lead to a violation of the principles of the irremovability of judges and judicial independence, principles which are strongly embedded in EU law and guaranteed by Article 19(1) TEU and Article 47 of the EU Charter (see the arguments of the CJEU in case C-487/19 *W.Ż.*). Similarly, protection against arbitrary transfer is acknowledged by the European Court of Human Rights under Article 6 of the Convention as a corollary of judicial independence. As a result, the Kúria can easily get into trouble if the problems of arbitrary judicial transfers and the unlaw-

ful composition of judicial panels are brought before European courts.

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