



# Most Pressing Issues of the Hungarian Law on Administrative Courts and Relevant International Standards

**For the Venice Commission regarding its visit to Budapest on 4-5 February 2019**

The Hungarian Helsinki Committee has closely followed legislative developments on administrative courts and has published two analyses: the first in June 2018 before the Amendment of the Fundamental Law on administrative courts was adopted<sup>1</sup> and the second in December 2018 on the new laws on administrative courts.<sup>2</sup> Since then we have discussed the effect of changes with sitting judges and lawyers with significant experience in administrative justice.

While many of the provisions of the two laws<sup>3</sup> are to be found in other jurisdictions, the provisions, taken together, compose a risky combination with immense powers for the Minister of Justice and negligible authority for judicial self-governance. The laws combine legislative solutions that might work well in other jurisdictions under different circumstances but which are risky if applied all at the same time in Hungary.

**The Hungarian Helsinki Committee is of the opinion that the laws violate European standards on judicial independence. This document lists a summary of the most important issues and some of the relevant standards.**

## **I. The Minister decides on judicial appointments**

The Minister of Justice will have the final say in judicial appointments under the new rules what contradicts European standards on judicial independence. The Minister will have the power to deviate from the ranking of applicants by the National Administrative Judicial Council (NAJC), the self-governing body of administrative judges.<sup>4</sup> Although the law involves the NAJC Personnel Council in the decision making, the Minister would be able to disregard the ranking of applicants by the NAJC Personnel Council

---

<sup>1</sup> Hungarian Helsinki Committee, *Attacking the last line of defence*, available at: <https://www.helsinki.hu/en/attacking-the-last-line-of-defence/>.

<sup>2</sup> Hungarian Helsinki Committee, *Blurring the Boundaries: New Laws on Administrative Courts Undermine Judicial Independence*, available at: <https://www.helsinki.hu/en/blurring-the-boundaries-new-laws-on-administrative-courts-undermine-judicial-independence/>.

<sup>3</sup> Act CXXX of 2018 on Administrative Courts and Act CXXXI of 2018 on the Entry into Force of the Act on Administrative Courts and Certain Transitional Rules.

<sup>4</sup> Act CXXX of 2018 on Administrative Courts 72. § (2).

and forward almost any applicant to the President of the Republic for an appointment. The appointment by the President is merely a formality, thus the main decision making power is vested with the Minister.

The ranking system is designed in a way where it is most likely that all relevant applicants will be forwarded to the Minister, thus the NAJC Personnel Council's recommendation does not act as a real counterweight to the Minister's powers. The NAJC Personnel Council distributes 80 % of the points to candidates based on objective criteria (objective points), and thus its opinion affects only 20 % of points given (subjective points).<sup>5</sup> Then, all candidates reaching 85 % of the points of the highest ranking candidate should be forwarded to the Minister.<sup>6</sup> The divergence of subjective points of candidates is reduced by the rule that the smallest and highest points given by any member of the NAJC Personnel Council should be disregarded in counting the final points of the candidate.<sup>7</sup> Because the influence of the NAJC Personnel Council is only around 20 % and the subjective points given will likely be close to each other, almost all applicants with relevant knowledge and experience will most probably be forwarded to the Minister<sup>8</sup> who makes the final decision on the judicial appointment.

The Venice Commission emphasized that systems "in which the executive power has a strong influence on judicial appointments" may work well in older democracies "because the executive is restrained by legal culture and traditions, which have grown over a long time." On the other hand, new democracies "have not yet had a chance to develop these traditions, which can prevent abuse." As such, in new democracies, "explicit constitutional provisions are needed as a safeguard to prevent political abuse by other state powers in the appointment of judges."<sup>9</sup> The Venice Commission explicitly concluded that a mixture of appointment by the Head of State and appointment by the Government "may function in a system of settled judicial traditions but its introduction in new democracies would clearly raise concern."<sup>10</sup>

**Hungary should by no means deemed an "older democracy" with "settled judicial traditions" in the meaning of Venice Commission standards.** Hungarian democracy was not only established as late as 1989, but recent developments make it clear that the Hungarian constitutional system should not be regarded as settled. Hungary is the first country ever in the history of the European Union against which the European Parliament triggered the procedure to determine the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded under Article 7 of the Treaty on European Union.<sup>11</sup> An important part of the report is based on the

---

<sup>5</sup> Act CXXX of 2018 on Administrative Courts 70. § (2).

<sup>6</sup> Act CXXX of 2018 on Administrative Courts 70. § (7).

<sup>7</sup> Act CXXX of 2018 on Administrative Courts 70. § (6).

<sup>8</sup> It is important to note, that the reasoning of the law contradicts the text of the law: according to the reasoning, the NAJC sends the top three candidate to the Minister, but the text of the Bill provides for the 85 % rule. This suggests that an earlier version of the text was more restrained and similar to the present system of judicial appointments where the top three candidates are possible to be appointed (but the consent of the National Judicial Council is required, which is not necessary in the new appointment system for Administrative Courts), see: Act CLXII of 2011 on the Status and Remuneration of Judges 18. § (3)-(5).

<sup>9</sup> Venice Commission, Report on Judicial Appointments (2007), CDL-AD(2007)028, at para. 5-6, available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2007\)028-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)028-e). ("In some older democracies, systems exist in which the executive power has a strong influence on judicial appointments. Such systems may work well in practice and allow for an independent judiciary because the executive is restrained by legal culture and traditions, which have grown over a long time.

New democracies, however, have not yet have a chance to develop these traditions, which can prevent abuse. Therefore, at least in new democracies explicit constitutional provisions are needed as a safeguard to prevent political abuse by other state powers in the appointment of judges.")

<sup>10</sup> Venice Commission, Report on Judicial Appointments (2007), CDL-AD(2007)028, para. 15, available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2007\)028-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)028-e).

<sup>11</sup> European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)), available at:

concerns regarding judicial independence.<sup>12</sup> Moreover, a fundamental redesign of court administration took place in 1997 and again in 2013, thus it is impossible to characterize Hungarian judicial traditions as “settled”.

In its 2007 *Report on Judicial Appointments*, the Venice Commission took the position that the establishment of a judicial council with “a decisive influence on the appointment and promotion of judges” is “an appropriate method for guaranteeing judicial independence.”<sup>13</sup> The European Charter on the Statute for Judges also supports “the intervention of an authority independent of the executive and legislative powers” “[i]n respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge.”<sup>14</sup> The OSCE’s Kyiv Recommendations also provide for the decisive role of an independent body in judicial selection, even in head of state direct appointment systems, suggesting that such a body could even be endowed with a power to override a presidential veto on judicial appointments:

Where the final appointment of a judge is with the State President, the discretion to appoint should be limited to the candidates nominated by the selection body (e.g. Judicial Council, Qualification Commission or Expert Commission [...]). Refusal to appoint such a candidate may be based on procedural grounds only and must be reasoned. In this case the selection body should re-examine its decision. One option would be to give the selection body the power to overrule a presidential veto by a qualified majority vote. All decisions have to be taken within short time limits as defined by law.<sup>15</sup>

The Consultative Council of European Judges (CCJE) is also of the opinion that “it is essential for the maintenance of the independence of the judiciary that the appointment and promotion of judges are independent and are not made by the legislature or the executive but are preferably made by the Council for the Judiciary”<sup>16</sup>

---

<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2018-0340&language=EN&ring=A8-2018-0250>.

<sup>12</sup> Paras 12-19.

<sup>13</sup> Venice Commission, Report on Judicial Appointments (2007), CDL-AD(2007)028, paras. 48-50, available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2007\)028-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)028-e). (“An appropriate method for guaranteeing judicial independence is the establishment of a judicial council, which should be endowed with constitutional guarantees for its composition, powers and autonomy. Such a Council should have a decisive influence on the appointment and promotion of judges and disciplinary measures against them.

A substantial element or a majority of the members of the judicial council should be elected by the Judiciary itself. In order to provide for democratic legitimacy of the Judicial Council, other members should be elected by Parliament among persons with appropriate legal qualifications.”)

<sup>14</sup> Council of Europe, European Charter on the Statute for Judges (1998), at 1.3, available at:

<https://rm.coe.int/16807473ef> cited in Venice Commission, Report on Judicial Appointments (2007), CDL-AD(2007)028, para. 19, available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2007\)028-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)028-e). (“In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.”) According to the Explanatory Memorandum of the European Charter, the term “intervention” of an independent authority means an opinion, recommendation or proposal as well as an actual decision. See Venice Commission, Report on Judicial Appointments (2007), CDL-AD(2007)028, para. 19, available at:

[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2007\)028-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)028-e).

<sup>15</sup> OSCE, Kyiv Recommendations (23-25 June 2010), para. 23, available at:

<https://www.osce.org/odihr/KyivRec?download=true>.

<sup>16</sup> Opinion no.10(2007) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society, para 48, available at: <https://rm.coe.int/168074779b>.

**It is incompatible with European standards and is highly risky for judicial independence if the Minister is granted the final decision over judicial appointments in Hungary. The Minister should not have the power to override the ranking of candidates by the NAJC Personnel Council or should have this right only with the consent of a reinforced and independent NAJC Personnel Council** (as to the composition of the NAJC Personnel Council, see below section III. 2. on the composition of the NAJC Personnel Council in the appointment of judges).

The above considerations apply to the promotion of judges and the appointment of judges to senior positions. The Minister's overarching powers in this regard are described in the Hungarian Helsinki Committee's earlier position paper titled *Blurring the Boundaries*.<sup>17</sup>

## **II. The massive influx of newly appointed judges even to the highest level of administrative courts**

The present transition period when a completely new branch of the judiciary is established requires strong guarantees against arbitrary interference. Those appointed in the transition period in 2019 to the Administrative High Court will adjudicate at this court for many years, some of them for decades. This is the reason why the first round of appointment is crucial for Hungarian administrative justice. There are currently 20 judges at the *Kúria* (Supreme Court) adjudicating primarily administrative disputes.<sup>18</sup> These are the judges who may request, by the force of the new law, to be taken to the Administrative High Court.<sup>19</sup> As described below, the Minister has the power to set the number of judicial positions at the High Court. It is currently unknown how many judicial positions the Minister wishes to allocate to the High Court. It was already described above that the final say on judicial appointment is vested with the Minister. **The Ministerial powers and other regulations listed below, taken together, allow the Minister to exert a decisive influence on the number and selection criteria of administrative judges, and to shape the judicial personnel of administrative courts (especially the Administrative High Court) for many years, possibly decades to come.**

### **1. The Minister determines the scoring of applicants and there is no competitive examination**

A ministerial decree describes the scoring system<sup>20</sup> of applicants wishing to become a judge. This system rewards earlier practice, exams taken, knowledge of foreign languages, publications and similar achievements but do not contain any competitive examination of the applicants' knowledge. The scoring system was amended in 2017 by the Minister in order to grant easier access to a judicial career for former public servants. **This system favours in some aspects applicants from the administration over career judges and it shows a government preference towards judges coming from the public service.** Moreover, the current system awards points which might only be gained by public servants and not by judges (e.g. for taking part in legislative drafting or representation in lawsuits).

---

<sup>17</sup> *Blurring the Boundaries – New Laws on Administrative Courts Undermine Judicial Independence*, pages 9-10 ("Promotion of individual judges and appointment to senior positions"), available at: <https://www.helsinki.hu/wp-content/uploads/Blurring-the-Boundaries-Admin-Courts-HHC-20181208-final.pdf>.

<sup>18</sup> The webpage of the court system lists all judges and it is possible to filter down only judges working at the *Kúria*. The number of judges with a primarily administrative assignment is 20, but there are other judges who might occasionally adjudicate administrative cases, available at: [https://birosag.hu/birak?tid=K%C3%BAria&field\\_kijeloles1\\_tax\\_tid=All](https://birosag.hu/birak?tid=K%C3%BAria&field_kijeloles1_tax_tid=All).

<sup>19</sup> Act CXXXI of 2018 on the Entry into Force of the Act on Administrative Courts and Certain Transitional Rules 2. § (1)

<sup>20</sup> Decree 7/2011. (III.4.) KIM

The Hungarian appointment system of administrative judges does not contain a competitive examination or another objective method for assessing candidates' competences, but it is based solely on the selection of judges from among experienced practitioners. **As the Venice Commission noted, "selection of judges from a pool of experienced practitioners, ... could raise concerns as regards to the objectivity of the selection procedure".**<sup>21</sup>

In an appointment system like the Hungarian, where judges earn points based on their previous experience and achievements but not on the basis of a competitive examination, it is possible for the Government to fine-tune the scoring system as it wishes. As described above, recent changes suggest a Government preference for judges coming from a public service background over career judges which poses a risk to the integrity of the judicial system.

## **2. The Minister determines the number of judicial positions**

The Minister will have the power to decide on the number of administrative judicial positions.<sup>22</sup> This allows the Minister to determine what will be the proportion of former judges compared to newly appointed judges. The personnel of the new administrative courts will, naturally, have an overarching impact on the functioning and organizational ethos of these courts. If the Minister wishes, he or she will be in a position to fine-tune the number of former judges compared to judges coming from the administration and thus, to influence the sociological setup of the courts. While working in the administration requires loyalty and hierarchy, being a judge requires a different mindset of independence.

**With the power to determine the number of judicial positions, the Minister might also scale the workload of administrative judges.** If the Minister wishes to grant good working conditions and a low number of cases assigned to individual judges, he or she might set a high total number of judges. On the contrary, if the Minister is interested in a lower level of the quality of administrative justice, he or she might set a low level of total judicial positions. This influence of the Minister over administrative judiciary is too broad.

The law does not provide for an appeal against the Minister's decision on the number of judicial positions. It is not likely that it would be challengeable before courts under the general provisions of administrative or constitutional law because it would be very hard to establish standing.

## **3. Persons without judicial experience might become High Court judges**

Under the new rules, persons without any previous judicial experience might be appointed as judges to the Administrative High Court. While it is not in itself wrong if not only career judges but civil servants, lawyers and academic experts might also join the judiciary, there is a high risk that persons without judicial training and with a high level of loyalty to the government will flood the new administrative courts. This risk is even higher if taken into account the broad powers of the Minister on judicial appointments described above.

**The three properties of the appointment system listed here, taken together, allow the Minister to influence administrative courts on a systemic level.** The Minister determines in a decree the scoring system of judicial applicants to favour former civil servants, the Minister determines the total number of judicial positions and the system allows for persons without judicial experience (e.g.

---

<sup>21</sup> Venice Commission, Report on Judicial Appointments (2007), CDL-AD(2007)028, para. 36, available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2007\)028-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)028-e).

<sup>22</sup> Act CXXXI of 2018 on the Entry into Force of the Act on Administrative Courts and Certain Transitional Rules, 9. § (2).

civil servants) to become High Court judges. The Minister's powers in such a system are extremely excessive and allow for undue influence over administrative judiciary on a systemic level.

### III. Extremely weak judicial self-governance

#### 1. The powers and composition of the NAJC

Judicial self-governance is the bedrock and guarantee of judicial independence, but under the new law, the NAJC and other self-governing bodies will have no real power. As described above, the NAJC will not have decisive power over judicial appointments and promotions. **The NAJC will neither have a decisive say in the scoring system of administrative judges,<sup>23</sup> nor the determination of the number of judicial positions.<sup>24</sup> Among the eight enumerated powers of the NAJC, only two are decisive: the right to block the modification of the regional administrative courts' budget during the fiscal year and to give awards.<sup>25</sup>** The weak powers of the NAJC were detailed in the Hungarian Helsinki Committee's earlier position paper titled *Blurring the Boundaries*<sup>26</sup> and above regarding judicial appointments.

According to the CCJE, a judicial council's task is to "safeguard both the independence of the judicial system and the independence of individual judges",<sup>27</sup> but the NAJC is unfit for this purpose in its current form. The CCJE also noted that judicial councils should "functions outside any control of the executive and the legislature".<sup>28</sup> **It is important to note in this context that the new law would not grant immunity to NAJC members from disciplinary procedures, contrary to the current protection of the members of the National Judicial Council.**<sup>29</sup> This is crucial because it has already happened in 2018 that judicial leaders attempted to exert pressure on council members by initiating disciplinary procedures against them and the immunity (waivable only by the Council) was important to protect the integrity of the Council.<sup>30</sup>

**Under the new rules, NAJC Personnel Council members would lose their membership if a disciplinary procedure is pending against them (that is, it is not necessary that any wrongdoing would be established, the starting of the disciplinary procedure is enough for a termination of the membership).<sup>31</sup> As a consequence, it would be possible for judicial leaders to silence NAJC Personnel Council members by only initiating a disciplinary**

---

<sup>23</sup> The NAJC will only be able to give its opinion on laws, including the one on the scoring system, see Act CXXX of 2018 on Administrative Courts 25. § (2) b).

<sup>24</sup> At the time of the determination of the number of judicial positions, the NAJC do not even exist yet. The number of judicial positions are determined between 1 May and 15 July 2019, see: Act CXXXI of 2018 on the Entry into Force of the Act on Administrative Courts and Certain Transitional Rules, 9. § (2), for the timeline: 8. § (6) and 9. § (4).

<sup>25</sup> Act CXXX of 2018 on Administrative Courts 25. § (2).

<sup>26</sup> *Blurring the Boundaries – New Laws on Administrative Courts Undermine Judicial Independence*, pages 11-12 ("Judicial self-administration weakened"), available at: <https://www.helsinki.hu/wp-content/uploads/Blurring-the-Boundaries-Admin-Courts-HHC-20181208-final.pdf>.

<sup>27</sup> Opinion no.10(2007) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society, para 8, available at: <https://rm.coe.int/168074779b>.

<sup>28</sup> Opinion no.10(2007) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society, para 12, available at: <https://rm.coe.int/168074779b>.

<sup>29</sup> Act CLXI of 2011 on the Organization and Administration of Courts 110. § (3)

<sup>30</sup> 444.hu "Fegyelmi eljárásokat kezdeményeznek ellenzéiknek gondolt bírák ellen", available at:

<https://444.hu/2018/06/14/fegyelmi-eljarasokat-kezdemenyeznek-ellenzekinek-gondolt-birak-ellen>, National Judicial Council, "Összefoglaló az Országos Bírói Tanács 2018. év április hó 18. napján 10:00 és 14:05 óra között megtartott üléséről", available at: <https://orszagosbiroitanacs.hu/?mdocs-file=581>.

<sup>31</sup> Act CXXX of 2018 on Administrative Courts 28. § (5) e) 8. § (5) c).

**procedure.** To protect NAJC members from outside pressure from, among others, the Minister, NAJC members should have protection against disciplinary procedures.

**The NAJC does not have its own budget, staff or legal personality which poses a substantial threat to its functionality<sup>32</sup> in clear contradiction with the CCJE’s opinion, according to which judicial councils should have “power and capacity to negotiate and organise [their] own budget effectively”.<sup>33</sup>** The law provides for a secretariat for the NAJC working at the Administrative High Court but taken into account that the president of the NAJC is the president of the High Court, there is a great risk that the secretariat will be heavily influenced by the High Court president.<sup>34</sup> The law does not have the necessary safeguards to assure that “each member [would] have staff in accordance with the tasks assigned to him or her”,<sup>35</sup> and not only the President of the NAJC would decide on secretariat resources.

The CCJE argues that judicial councils should have “a wide range of tasks aiming at the protection and the promotion of judicial independence and efficiency of justice” ranging from the appointment, promotion, assessment, and training of judges as well as budgeting of courts.<sup>36</sup> As the law currently stands, it grants none of these powers to the NAJC.

**It is also problematic that the President of the NAJC is not a judge elected by their peers (but rather the President of the High Court elected by Parliament) and is not elected as chair by the NAJC.**<sup>37</sup> The CCJE suggests that if not the Head of State is the president of the council, then a judge elected by the Council should be the chair of the council.<sup>38</sup>

## **2. The composition of the NAJC Personnel Council in the appointment of judges**

The NAJC Personnel Council will have a role in judicial appointment as described above. It was already mentioned that the Minister might override the ranking of judges by the NAJC Personnel Council. Moreover, this body does not have a majority of judges elected by their peers, a clear contradiction with international standards. The NAJC Personnel Council has nine members:<sup>39</sup>

1. its president is the President of the Administrative High Court, elected by the Parliament,
2. four judge members are elected by the NAJC from among its members,
3. four non-judge members are elected or invited by the Committee on Justice of the National Assembly, the Prosecutor General, the minister responsible for the organisation of public administration, the president of the Hungarian Bar Association.

---

<sup>32</sup> Act CXXX of 2018 on Administrative Courts does not legislate for a separate budget for the NAJC. The law does not grant legal personality to the NAJC curbing its power to enter into contracts even for minor purchases (e.g. for travel or event organisation).

<sup>33</sup> Opinion no.10(2007) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society, para 37, available at: <https://rm.coe.int/168074779b>.

<sup>34</sup> Act CXXX of 2018 on Administrative Courts 25. § (3), 26. § (1).

<sup>35</sup> Opinion no.10(2007) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society, para 38, available at: <https://rm.coe.int/168074779b>.

<sup>36</sup> Opinion no.10(2007) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society, paras 41-87 and the Summary section D, available at: <https://rm.coe.int/168074779b>.

<sup>37</sup> Act CXXX of 2018 on Administrative Courts 26. § (1).

<sup>38</sup> Opinion no.10(2007) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society, para 33, available at: <https://rm.coe.int/168074779b>.

<sup>39</sup> Act CXXX of 2018 on Administrative Courts 28. §.

As it is apparent, only a minority, four members of the NAJC Personnel Council are judges elected by their peers.

In the transition period of 2019, the equivalent of the NAJC Personnel Council (the ad-hoc Evaluation Committee) will have no judge members elected by their peers. The Evaluation Committee consists of the similar persons as the NAJC Personnel Council instead of the elected judge members, who are substituted by judges drawn by lot.<sup>40</sup>

**As a consequence, none of the members of the ad-hoc Evaluation Committee is elected by their peers, in clear and blatant violation of European standards on judicial councils. Instead of drawing judges by lot, members of the Committee should be elected by their peers or the competences of the Committee should be vested with the National Judicial Council, the currently functioning equivalent of the NAJC.**

As a stark contrast to the membership structure of the NAJC Personnel Council, the CCJE considers it important that "a substantial majority of the [council] members should be judges elected by their peers"<sup>41</sup> which is not true for the NAJC Personnel Council because it has only 4 out of 9 judge members elected by their peers. The ad-hoc Evaluation Committee obviously falls short of this standard but it also fails to satisfy the Venice Commission standard that "a substantial element or a majority of the members of the Judicial Council should be elected by the Judiciary itself",<sup>42</sup> as no member of this council is elected among judges by their peers.

**As it was detailed above, the first round of appointments this year will shape the practice and working environment of administrative courts possibly for decades.** For this reason, it is crucial that the ad-hoc Evaluation Committee should be in line with international standards and have at least half of its members who are judges elected by their peers.

#### **IV. Breach of the principle of legal certainty in the transfer of judges**

The jurisdiction of the administrative courts is not yet final, causing legal certainty problems affecting individual judges' careers.

**Freedom of information** (the right to know) cases, for example, are not administrative disputes in Hungary, therefore as the law currently stands, will not be transferred to the new court system. The Minister of Prime Minister's Office, however, said at a press conference in November 2018 that "based on common sense, [freedom of information cases] should rather belong to administrative courts".<sup>43</sup> Freedom of information requests are heavily used in Hungary by journalists and the civil society to gain access to data from an increasingly secretive government which often does not answer journalistic questions. Freedom of information cases are currently decided by civil law judges with significant

---

<sup>40</sup> Act CXXXI of 2018 on the Entry into Force of the Act on Administrative Courts and Certain Transitional Rules 10. § (2) a).

<sup>41</sup> Opinion no.10(2007) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society, para 18, available at: <https://rm.coe.int/168074779b>.

<sup>42</sup> Venice Commission, Report on Judicial Appointments (2007), CDL-AD(2007)028, para. 29, available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2007\)028-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)028-e).

<sup>43</sup> Press report on the weekly press conference of Gergely Gulyás, Minister of Prime Minister's Office on 15 November 2018. "Ha Grueszki itt lehet, befogadnánk-e a katalán ex-elnököt it? Megkérdeztük", available at: [https://azonnali.hu/cikk/20181115\\_gulyas-nem-zarta-ki-hogy-orban-talalkozni-fog-gruevszkivel](https://azonnali.hu/cikk/20181115_gulyas-nem-zarta-ki-hogy-orban-talalkozni-fog-gruevszkivel).

experience, who do not have the right to request a transfer to the new courts because only judges currently deciding administrative cases have the right for such a request.<sup>44</sup>

If freedom of information disputes will be transferred to the administrative courts, the judges having experience in this area of law will find themselves in a very hard situation. **Their area of expertise is deemed to be an administrative issue, but they cannot request a transfer to the new courts but have to apply for a position. This creates inequality between judges who are deciding cases falling within the jurisdiction of administrative courts (i.e. between administrative judges and civil judges ruling on freedom of information disputes).**

The application period for 'ordinary' judges and everyone else, for an administrative judicial position, will begin between May and July (determined by the Minister). **The Government and the Parliament must clearly define the powers of the administrative courts as soon as possible, and therefore allow judges to make an informed decision on their career.**

The fact that the jurisdiction of administrative courts is not yet settled is shown by the above example of freedom of information cases.

### **The future of election disputes is also still uncertain.**

Election disputes are fundamentally important in a democracy and are currently decided in a *sui generis* special procedure under the Law on Election Procedure<sup>45</sup> and the most important cases (e.g. complaints against the decisions of the National Election Commission on election fraud allegations, counting of votes, campaigning) are decided by the *Kúria's* administrative law judges. It is, however, not yet settled whether election disputes will, or will not be transferred to the new administrative court system.

The confusion over the jurisdiction in election cases is caused by a draft amendment submitted to Parliament in October 2018 but revoked a month later. On 19 October 2018 a proposal was submitted to the Law on Election Procedure which would have stated that election disputes are administrative cases.<sup>46</sup> The draft law was submitted by the Deputy Prime Minister Zsolt Semjén and the Rapporteur was the Minister of Prime Minister's Office, Gergely Gulyás. Because the proposed administrative courts have a general jurisdiction on all administrative disputes, this would have meant that election cases are decided by administrative courts.

Before the final vote, on November 22 2018, the Legislative Committee of the Parliament submitted a proposal to drop this change.<sup>47</sup> The Committee has a government majority of 24 out of 38<sup>48</sup> and the Parliament's governing majority adopted the law on 12 December 2018 without the amendment proposed by the government.<sup>49</sup>

---

<sup>44</sup> Act CXXXI of 2018 on the Entry into Force of the Act on Administrative Courts and Certain Transitional Rules, §2 (1) only mentions members of "a regional administrative and labour division", and has no provision regarding judges currently deciding cases which will fall under the jurisdiction of the administrative courts.

<sup>45</sup> Act XXXVI of 2013 on the Election Procedure

<sup>46</sup> Proposal number T/2941, 11. § on pages 3-5, available at:

<http://www.parlament.hu/irom41/02941/02941.pdf>.

<sup>47</sup> Proposal number T/2941/7, amendment point 4 on pages 2-6, available at:

<http://www.parlament.hu/irom41/02941/02941-0007.pdf>.

<sup>48</sup> See the members of the Committee here: <http://www.parlament.hu/web/torvenyalkotasi-bizottsag/a-bizottsag-jelenlegi-tagjai>. The governing parties are Fidesz and KDNP.

<sup>49</sup> The voting records are to be found at: [http://www.parlament.hu/iromanyok-lekerdezese?p\\_auth=VQsYg9hO&p\\_p\\_id=pairproxy\\_WAR\\_pairproxyportlet\\_INSTANCE\\_9xd2Wc9jP4z8&p\\_p\\_lifecycle=1&p\\_p\\_state=normal&p\\_p\\_mode=view&p\\_p\\_col\\_id=column-1&p\\_p\\_col\\_count=1&pairproxy\\_WAR\\_pairproxyportlet\\_INSTANCE\\_9xd2Wc9jP4z8\\_pairAction=%2Finternet%2Fcplsql%2Fogy\\_irom.irom\\_adat%3Fp\\_ckl%3D41%26p\\_izon%3D2941](http://www.parlament.hu/iromanyok-lekerdezese?p_auth=VQsYg9hO&p_p_id=pairproxy_WAR_pairproxyportlet_INSTANCE_9xd2Wc9jP4z8&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_p_col_id=column-1&p_p_col_count=1&pairproxy_WAR_pairproxyportlet_INSTANCE_9xd2Wc9jP4z8_pairAction=%2Finternet%2Fcplsql%2Fogy_irom.irom_adat%3Fp_ckl%3D41%26p_izon%3D2941).