



COURT CAPTURE PROJECT COMPLETED

The Hungarian recipe for getting a grip on the judiciary

26 October 2022

EXECUTIVE SUMMARY

Undermining the independence of the judiciary in Hungary has been a constant endeavour of the Fidesz-led political majority since it gained constitutional power in 2010. The project of capturing independent courts – both the [Constitutional Court](#) and the [ordinary court system](#) – has been in progress for over ten years and has nearly come to full completion, with only one weak, but independent judicial self-governing body standing: the National Judicial Council (NCJ). Until 2018, the attempts to gain political control over courts targeted the judiciary as a whole. A series of aggressive legislative steps were taken to undermine judicial independence both on the individual and the organisational level. Open attacks against the judiciary included the dismissal of individual judges and judicial leaders through [forced early retirement](#), the [removal of the President of the Supreme Court](#) by *ad hominem* legislation and taking control over judicial administration by [concentrating court management powers](#) in the hands of a political appointee, the President of the National Office for the Judiciary (NOJ). Despite all endeavours, the Hungarian judiciary stood its ground, the large majority of judges preserved their independence. Internal tensions culminated in a [constitutional crisis](#), whereby the NJC initiated (in vain) the removal of the NOJ President who refused to cooperate with the council and hindered it in performing its constitutional task of overseeing the administration of the court system. The strive for a power grip on the judiciary came to a turning point in 2018, shortly after the Kúria (the supreme court of Hungary) delivered a judgment that deprived the third-time-in-a-row winning Fidesz party of one mandate in the 2018 Parliamentary Elections. As the legislative steps taken after 2018 reveal, at this point, the governing majority recognised that capturing the whole judiciary comprising 3000 independent judges is just too big a bite. Instead of further striving to take control of the judiciary as a whole, the court capture project was strictly narrowed down to one single judicial body constituting the final instance of adjudication and comprising less than 100 judges: the Kúria. After this strategic decision, the Hungarian government quickly and successfully developed its own recipe for gaining political control over the judiciary. The court capture project launched after the 2018 Parliamentary Elections was completed by 2021, ensuring that by the 2022 Parliamentary Elections, all politically sensitive cases end up at a loyal court instance. For unexpected cases of system failure, the Hungarian government also took care to build in extra safety features guaranteeing a government-aligned outcome for all politically relevant cases. By the fall of 2022, only one open question remains: the fate of the last independent body, the NJC.

INTRODUCTION

The present paper provides a brief description of the most important **legislative and court administration steps taken after 2018 that aimed to create an apex court in Hungary that is characterised by a highly increased likelihood of adjudicating** politically sensitive cases in a manner that is favourable for the government. The main phases and steps of the process were the following:

- (i) The first phase of the court capture process was launched in 2018 amidst **intensified public criticism of the Kúria by ruling party politicians**, including the Prime Minister [see Section I.1. below]. During this first phase, the government went for the so-called **emptying court-packing strategy** aimed at depriving the Kúria of its core competences over state authorities and **establishing a separate administrative court system with judges freshly appointed by the Minister of Justice**. This first attempt was so blatant that international criticism eventually forced the government to abandon the plan and put aside the already adopted legislation [see Section I.2. below].
- (ii) In 2019, after the failed attempt, the Hungarian government switched strategy and decided to apply the **expanding court-packing strategy**. During this second phase of the court capture procedure a series of legislative acts **increased the weight of the Kúria within the court system and concentrated the most**

important judicial powers at the apex court, also providing a reason for raising the number of sitting judges at the Kúria and a legal basis for an intense court-packing [see Section II.1. below].

- (iii) Simultaneously, to **ensure the political purposes of the court-packing process**, several legislative modifications were introduced also enabling the application of **swap court-packing techniques**, aiming at replacing sitting judges. The legislation adopted in 2019 abolished separate administrative and labour courts and **entitled judicial leaders to reselect judges who may handle administrative cases (i.e. lawsuits in which state authorities are involved)**. New rules also entitled the Constitutional Court justices to request their transfer to the Kúria, providing **a direct gateway for political appointees to the top tier of the court system**. A new Kúria President was elected based on these new rules and on a set of *ad hominem* legislative measures introduced just a couple of months before the **new Kúria President's election** became due [see Section II.2. below].
- (iv) The third phase was the fine-tuning of the court-packing process carried out in a more latent manner, by **court administration measures** taken by two political appointees holding excessive powers within the judiciary (the NOJ President and the Kúria President) through arbitrary secondments, unlawful judicial appointments, informal promotions and through the manipulation of the case allocation system [see Section II.3. below].
- (v) In addition to the above, the government also took due care to build further safety features into the system to control the outcome of court decisions by **creating a possibility to channel out of the ordinary court system politically sensitive cases to the already captured Constitutional Court** and by granting exclusive power to the captured Kúria to **determine the mandatory interpretation of laws through uniformity decisions** [see Section III. below].

I. A FAILED ATTEMPT OF CAPTURE BY EMPTYING

I.1. The trigger: an unfavourable Kúria resolution

In April 2018, during the 2018 Parliamentary Elections, the Kúria (as the competent court to rule in election matters) upheld the decision of the National Election Committee certifying the results of absentee ballots cast by mail-in and found that 4,360 ballots were invalid. If the contested ballots had been counted, it would have resulted in one additional seat for Fidesz in the Parliament, strengthening the constitutional majority of the ruling party. The unfavourable decision handed down by the Kúria triggered intense [public criticism](#) of the judiciary by government actors. On 5 May 2018 the spokesman of the Prime Minister [communicated](#) Viktor Orbán's statement: *"I think the Kúria has taken away one mandate from our voters with this decision. The Kúria has clearly and seriously interfered with the elections. After reading the decision of the Constitutional Court, it is obvious that the Kúria has not intellectually grown up to this task."* The case was cited by the [government-aligned media](#) as the decision of the Kúria that *"took one parliamentary mandate away from Fidesz"* and called the Kúria President personally responsible for the judgment.

I.2. The first shot: a blatant attempt to circumvent the Kúria

On 29 May 2018, a few weeks after the open criticism had been articulated by the Prime Minister, the government submitted to the Parliament Bill T/332 that [proposed](#) to **set up a separate, heavily government-controlled administrative court system with effect of 1 January 2020**. The idea was to split the court system in two and set up a separate Administrative High Court to take over the jurisdiction of the Kúria in administrative cases (i.e. legal disputes about decisions taken by state authorities) without the possibility of the Kúria to review such decisions. The [new administrative courts](#) would have gained exclusive competence in the adjudication of cases related to fundamental rights, such as matters of **election, administrative decisions by the police, asylum, or the exercise of the right to peaceful assembly, as well as cases with significant economic relevance, such as disputes over taxation, customs, media, public procurement, land and forest ownership**. According to the official explanation provided by the government, the reason for establishing the new administrative court system was to restore the traditional Hungarian model of a separately organized administrative justice system. In fact, at the time of adopting these laws, Hungary already had a well-working system for the judicial review of administrative decisions, which was not facing any particular problems.

Setting up the separate administrative court system would have resulted in **replacing sitting judges adjudicating in administrative cases with new judges appointed by the Minister of Justice**. It also became widely held in professional circles that András Patyi was expected to be President of the planned Administrative High Court (to be elected by the governing majority for 9 years). While Bill T/332 was discussed in Parliament, András Patyi unexpectedly resigned from his previous positions and got appointed as judge, got transferred to and gained a judicial leadership position at the Kúria without an otherwise obligatory application procedure. His automatic appointment as Head of Panel at the Kúria was enabled by an *ad hominem* modification to the relevant law, the so-called [Lex Patyi](#), embodying the first step of the court-packing process.

The first court-packing attempt was designed along the emptying court-packing strategy. It aimed to deprive the Kúria of its competences and replace sitting judges with new judges appointed by the Minister of Justice. While the reasons for establishing the separate administrative court system were rather symbolic, its detrimental consequences to the independence of the judiciary were quite concrete as confirmed by several international stakeholders. As the [Venice Commission](#) warned, *"very extensive powers are concentrated in the hands of a few stakeholders and there are no effective checks and balances to counteract those powers"*. As a result of the strong international criticism, in the summer of 2019, the Parliament decided to postpone the entry into force of the laws enacting the new court system, and later, in November 2019, the government stated that it had abandoned the idea of introducing the separate administrative courts.

II. A SUCCESSFUL ATTEMPT OF CAPTURE BY EXPANDING

II.1. The second shot: increasing the weight of the Kúria by legislation

In reality, the government did not at all abandon the idea of capturing the court system. The same goal was finally achieved "through the back door" by a reversed strategy: instead of emptying, by expanding the competences of the Kúria and instead of a one-off legislation, by a series of legislative amendments adopted between 2019–2021. The fact that **the planned administrative high court was finally realised "integrated" within the Kúria** was [publicly confirmed](#) on several occasions by András Zs. Varga, the incumbent Kúria President (who actively contributed to the court-packing process through court administration measures after being elected in 2020).

The legal framework for the court-packing process was established in November 2019, by the adoption of a new [Omnibus Act](#) that raised serious international [concerns](#) again. The new Omnibus Act introduced a comprehensive reform in the administrative section of adjudication **concentrating an overwhelming part of the administrative judicial powers in the hands of the Kúria**.

- With effect from **1 April 2020**, the Administrative and Labour Courts (20 of them, one for each county) were dissolved. The competences of the dissolved courts were distributed between eight designated regional courts that gained general competence as first instance courts and the Kúria. As a result, **the Kúria gained exclusive competence to rule** (i) as the **first instance court** (especially in certain politically sensitive matters, including cases related to elections and the right to freedom of assembly); (ii) as the **second instance court** (in general in all cases where regional courts ruled as first instance) and (iii) as the **court of extraordinary review** (in all administrative cases).
- In addition, with effect from **1 July 2020**, an additional level of judicial review was inserted in the system of adjudication. The new "uniformity complaint procedure" was claimed to be designed to guarantee the uniform application of the law. This legal remedy 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. This means that **the uniformity complaint panel of the Kúria gained competence to overrule the final and binding judgments of all other panels of the Kúria as a fourth instance** and also became entitled to establish the mandatory interpretation of the law as a result of the procedure by way of uniformity decisions.

The extension of the competences of the Kúria created a legal basis for increasing the number of sitting judges at the Kúria. Consequently, the number of judicial positions at the Kúria was raised in 2020 by the NOJ President by 23% opening 21 new vacant positions.

Less than two years later, with effect from **1 March 2022**, the system of administrative adjudication was modified, once again, establishing a third tier in the system. The new administrative court level was introduced (formally, a new administrative college of the already existing Metropolitan Court of Appeal was established) with the aim of replacing the Kúria **with a general court of second instance for first instance judgments handed down by regional courts in administrative cases**. Although the newly created Administrative College of the Metropolitan Court of Appeal overtook significant powers from the Kúria, this decrease in the number of competences did not result in reducing the number of sitting judges at the Kúria. In order to maintain the legitimacy of the increased number of judges at the Kúria, from 1 March 2022 (the same day when the Kúria's second instance competences were transferred to the Administrative College of the Metropolitan Court of Appeal), the law raised the number of the members of the adjudicating administrative panels of the Kúria from three to five (meaning that cases that used to be decided by panels of three judges are now decided by panels of five judges). This way **the increased number of sitting judges at the Kúria could be legitimised, even though the general secondary court competence was passed to the newly established court.**

II.2. Ensuring political purposes

After introducing the legislative changes that could legitimise the increase of the number of sitting judges at the Kúria, the Hungarian government also **introduced new laws that have radically modified appointment rules** and ensured the political ends of the court packing process. Some of the legislative amendments enabled the application of swap court-packing techniques, aiming at **replacing sitting judges**.

- New rules created a **direct gateway for political appointees to the Kúria** by entitling **members of the [government-friendly](#) Constitutional Court (CC) to be appointed as ordinary court judges upon their request**. Under these new rules, former CC members automatically become judges at the Kúria and may be appointed as Heads of Panels without an otherwise obligatory application procedure, even if they do not have any previous judicial experience in the ordinary court system. In the summer of 2020, based on these new rules, **eight members of the CC were appointed as judges**, six of them without any former courtroom experience.
- In October 2020, a **[new Kúria President was elected](#)** by the political majority of the Parliament (i) as a result of a series of *ad hominem* legislative amendments (ii) without relevant previous experience as judge and (iii) in complete disregard of the [NJC's objection](#), which held that the fact that [András Zs. Varga's](#) election was made possible by two recent legislative amendments "*is at odds with the constitutional requirement that requires the head of the judicial system be a person who is independent of the other branches of power and who appears impartial to an outside observer.*"
- On 1 April 2020, simultaneously with the dissolution of the former Administrative and Labour Courts, **all judges working at dissolved administrative courts got transferred to the ordinary court system** by the force of law. However, the legislation did not guarantee that a judge previously working as an administrative judge would continue to work in the same branch. After 1 April 2020, judges must be **explicitly assigned as administrative judges** so that they could adjudicate administrative cases. Assignments are granted based on the recommendation of court presidents, but the final decision is taken with **full discretion by the NOJ President** (with respect to judges serving at courts other than the Kúria) **and the Kúria President** (with respect to judges serving at the Kúria). The assignment as administrative judge can be terminated by the NOJ President (or the Kúria President) any time, even against the will of the assigned judge and without objective reasons or the obligation to justify the decision. In sum, the new legislation **entitled judicial leaders to sort out and reselect judges who may handle cases in which state authorities are involved**.
- Since 1 April 2020 **the safeguard clause prescribing a fixed one-year term** as the temporal scope of case allocation schemes within the courts was removed. This means that 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, also **allowing court presidents (including the Kúria President) to reshuffle the sitting judicial panels without any need to provide a justification.**

II.3 Fine-tuning by arbitrary court administration

The major part of the court-packing process was carried out through a series of legislative changes adopted between 2019-2021 in an extremely speedy manner, [without any public consultation](#) as required by domestic laws and international standards of the rule of law. Once the legislative framework was created, the court capture was finalised by judicial leaders, mostly the NOJ President and the Kúria President through court administration measures, particularly, by arbitrary secondments and biased appointments to judicial positions at the Kúria.

- As a result of arbitrary court administration decisions, in recent years a large number of vacancies in the Kúria were not filled through ordinary application procedures, but by **secondment of judges from lower tier courts to serve temporarily at the Kúria**. The [analysis of past year's secondment practice](#) revealed that the arbitrary application of secondment rules allowed the Kúria President to create disguised probationary periods and were actively **used to test judges who were willing to get promoted to the Kúria**. Examples show that an overwhelming majority of judges appointed to the Kúria had been seconded to the Kúria preceding their appointment.
- In July 2022, the NJC revealed that **the Kúria President [unlawfully appointed](#) several judges to the bench in 2021**. Members of the NJC found that the Kúria President arbitrarily circumvented the NJC's right to consent to judicial appointments and that appointments were not transparent and foreseeable, and lacked objective criteria. In the framework of the criticised application procedure, Barnabás Hajas, a former state secretary without any prior judicial experience could also become a judge at the Kúria.
- Since 2019 the number of judicial leadership positions at the Kúria were increased by the NOJ President allowing the appointment of new leaders. The number of vice-presidents at the Kúria was raised from 1 to 3; the number of deputy college leaders was raised from 2 to 4, the number of heads of panel was raised from 31 to 36 creating all together **9 new judicial leadership positions at the Kúria**.

Since the election of András Zs. Varga as Kúria President, the composition of the Kúria significantly changed. In less than two years, the new Kúria President granted altogether 18 judicial positions and at least 10 leadership positions (including the Vice-President, the Secretary, the Deputy Secretary, 3 College Leaders and 4 Deputy College Leaders) at the Kúria. In the end of October 2022, **in total 94 judges serve at the Kúria**, out of which at least (i) **2 judges - the Kúria President and the Kúria Vice-President - were appointed by *ad hominem* legislation**, without an ordinary application procedure; (ii) **1 judge was transferred to the Kúria circumventing the application procedure** by discretion of the NOJ President; (iii) **5 judges were appointed in breach of the laws**, circumventing the NJC's right to consent and (iv) **10 judges were appointed after being tested as seconded judges** at the Kúria, out of which at least **3 judges directly benefited from the secondment** during the application procedure.

III. EXTRA SAFETY FEATURES ENSURING LOYAL ADJUDICATION

In addition to the intense court-packing process carried out on the basis of the radical legislative changes adopted between 2019 and 2021, the Hungarian government also built further elements in the adjudication process to ensure that politically sensitive cases are adjudicated in a manner that is favourable for the government.

- **Since December 2019, the legislation enables state authorities to [channel politically sensitive cases out of the ordinary court system](#)** by holding the right to submit constitutional complaints to the CC if in their view their fundamental rights have been violated or if their scope of competence has been unconstitutionally limited by a final and binding decision handed down in the ordinary court system.
- Since June 2020, the legislation entitles the Kúria's **uniformity complaint panel to review the decisions of other panels of the Kúria and issue uniformity decisions establishing the mandatory interpretation of the law**. After being published in the National Gazette, the application of uniformity decisions is

compulsory for all ordinary courts. While **uniformity decisions are a very powerful tool to control the content of adjudication within the whole ordinary court system**, the rules governing the procedure lack sufficient guarantees as to the composition of the uniformity panels. The legislation grants the Kúria President a central role in the process providing him with the right to become head of the panel, the power to appoint judges who may become members of the panel and the right to determine the composition of the panel. Through this privileged role, the Kúria President holds a strong informal power in the adjudication of individual cases and in shaping the mandatory interpretation of the law. This power can be used to **overrule even the final and binding decision of any panel of the Kúria**. As the [Venice Commission](#) claimed, the Kúria President *"comes to play a central role that could influence in a decisive manner the uniformity complaint chamber and consequently the overall jurisprudence on a relevant matter. In the light of the Commission's concerns that the system lacks sufficient guarantees in relation to the President's appointment and dismissal, the Commission finds that there is a risk of politicisation."*

IV. THE NATIONAL JUDICIAL COUNCIL AS THE LOOSE END IN THE PROJECT

The court capture process has nearly come to full completion by 2022. Only one issue remains open: the status of the judicial self-governing body, the National Judicial Council. The NJC is composed of 15 members: 14 judges elected by their peers and the Kúria President. As the constitutional body mandated by the Fundamental Law to "supervise the central administration of courts," **the NJC signalled on several occasions that the legislation introduced or the measures taken by administrative leaders of the judiciary undermine the independence of judges**. Throughout the intense court-packing process the NJC amongst others (i) publicly opposed to the election of the new Kúria President (who later became *ex-officio* member of the council); (ii) repeatedly raised concerns with respect to the system of secondment of judges, claiming that the practice of secondments infringes the principles of appointment based on merits; (iii) called attention to the unlawful appointment practice of the Kúria President and the NOJ President and (iv) repeatedly requested concrete modifications of the legislation in order to restore the independence of the judiciary.

Although the legislation has serious deficiencies that prevent the NJC from fulfilling its constitutional role, the concerns publicly articulated by the NJC called attention to the ongoing court-packing and raised doubts as to the legitimacy of the process. The strong commitment of the current members of the NJC to fulfil the constitutional mandate of the council and raise awareness of the steps undermining judicial independence may entail further legislative steps that put an end to the last independent body mandated to ensure the independence of the judiciary.
