



Hungarian Helsinki Committee

**REMARKS
BY THE HUNGARIAN HELSINKI COMMITTEE
REGARDING THE EUROPEAN COMMISSION'S RULE OF LAW REPORT**

March 2021

1. Remarks regarding the process

- NGOs and other stakeholders wishing to contribute to the process do not have access to the respective Member State's report/input ahead of responding to the stakeholder consultation questionnaire. This makes it impossible for stakeholders to react to the potentially misleading statements or omissions of the Member State input, forcing them to "fly blind" and undermining the efficiency of the stakeholder contributions. The European Commission should consider adopting a system similar to the one customary for UN and other human rights monitoring bodies, where government reports are published ahead of the deadline for NGOs to submit their respective shadow reports.
- It is an issue of concern that, at least in 2020, the rule was that the input of Member States is made public by the Commission only if the respective Member State agrees to that. This gives rise to concerns even if none of the Member States opts for not disclosing their input to the public. In 2020, three Member States did not consent to their inputs being published.
- In the autumn of 2020, there was a lot of uncertainty around when the Rule of Law Report will be adopted and published. This made the planning of NGO efforts aimed at domestic awareness-raising and follow-up difficult. Similar uncertainties around the timing of the new round of stakeholder contributions occurred this year. Such instances may dissuade interested parties from participating in the process. The Commission should be aware that potential contributors have limited resources and capacities, and should consider creating a system where deadlines are more foreseeable.

2. Remarks regarding the stakeholder consultation questionnaire

- The structure and rigidity, and, in a sense, disproportionality of the questionnaire makes it difficult for contributors to show and capture the real nature of constitutional systems, especially the nature of regimes like Hungary. For example, there are only a handful of questions pertaining to the constitutional review of laws, the Constitutional Court or other independent institutions that should serve as checks and balances on executive power, and even those few questions are included in the last part of the questionnaire, even though these issues should be discussed widely and as a starting point in any such exercise. For example, while we do not want to question the importance of the "quality of justice", having multiple questions on the latter and none specifically on independent institutions in general can distort the overall picture in countries where the weakening of the institutions checking and balancing the executive is a

key problem. Furthermore, the questionnaire does not allow stakeholders to present in detail (or at all) rule of law concerns specific to their respective countries. For example, in Hungary, the undermining of academic freedom and university autonomy is another example of the government's efforts to weaken independent actors, and so it is closely related to the rule of law, but there is no dedicated section where such problems could be raised. Also, there is no dedicated section to address the track record of a Member State when it comes to executing the judgments of the European Court of Human Rights and the Court of Justice of the European Union. In this regard it could be a solution to provide an overall word/character limit and allow stakeholders to distribute the set number of words/characters between the different topics themselves. Furthermore, it would be advisable to assign a separate and brief section on "any other issue that poses a particularly pressing threat to the rule of law" in the contributors' view. While we understand that due to the lack of comparability these issues may not make it into the Commission's communication, it would be an important source of information for the Commission in its work of monitoring the rule of law situation in the Member States.

- It is only natural that the first stakeholder consultation questionnaire had some "teething problems". However, after the first "edition", it would have been important for the Commission to consider the opinions and criticisms shared publicly by academics, NGOs and other stakeholders as to the structure and the methodology, and should have considered a revision of the questionnaire to remedy the shortcomings as the ones listed above. However, this year's questionnaire is largely the same as the one used last year.

3. Remarks regarding the 2020 Country Chapter on the rule of law situation in Hungary

In the past months, an abundance of analyses and opinion pieces were published that assess and often criticise the Rule of Law report in general, and some of them the country chapter on Hungary specifically (see for example [here](#), [here](#) and [here](#)). We do not undertake here to summarise the several valuable and valid points made, but will focus instead on the concerns that are the most relevant for us as a Hungarian human rights NGO.

- The country chapter identifies substantial problems severely threatening the rule of law in Hungary in all four areas covered, echoing the assessment included in the Hungarian NGOs' contribution. Thus, the country chapter clearly attests to the rule of law being undermined in Hungary.
- However, as pointed out by several experts as well, the country chapter fails to do a most important thing: it fails to "connect the dots", and fails to consider and conclude that in the past years, the Hungarian government and the governing majority have intentionally and systematically dismantled the rule of law and the system of checks and balances. Thus, the country chapter fails to acknowledge that the rule of law deficiencies in Hungary are of structural and systemic nature; and fails to make it clear that the rule of law issues encountered with regard to Hungary are of a fundamentally different nature and scale than the issues in most of the other Member States.
- The deficiencies of the questionnaire's structure and the report's concept (e.g. with regard to the time period covered) also manifest themselves in the country chapter on Hungary. For example, the country chapter does not cover the capture of Hungary's Constitutional Court, which started almost a decade ago and has been fully accomplished years ago, and so it fails to put into context a recently introduced new form of constitutional complaint – which allows for channelling cases out of the ordinary court system to the already captured Constitutional Court. Another example is when the questionnaire's and the report's structure and concept result in a dissonance when highlighting positive developments and acknowledging systemic problems. As put by one of the expert opinions: it does not really matter how fast and effective court procedures are if the courts are not independent.

Furthermore, there are a number of rule of law problems, some of them already raised in the reports of various international stakeholders (and by Hungarian civil society organisations in the framework of the stakeholder consultation) that are not featured in the country chapter, even though they are of fundamental importance. Examples include the following:

Justice system:

- The report does not cover in adequate detail the deficiencies related to the appointment of judges and court leaders.
- The report fails to mention that the case allocation system is non-transparent both for the clients and for the judges themselves. Court leaders may abuse the case allocation system and may manipulate the adjudication of cases in this way.

Anti-corruption framework:

- The report does not address the deficiencies in the application of public procurement rules and the distorted nature of the functioning of the system, even though public funds are diverted mainly through public procurements, and this also affects the use of EU funds.
- The report does not address the deficiencies of the mechanisms that should control the use of EU funds.

Media pluralism:

- The independence of the public service media is not covered by the report, even though this is an area of major concern with regard to Hungary.
- The country chapter makes critical remarks regarding the non-transparent nature of media ownership in Hungary. However, the Commission's "communication" (covering all Member States) does not mention Hungary as a negative example in this regard, even though this is one of the major problems with regard to the media in the country.

Other institutional issues related to checks and balances:

- The report fails to provide an overarching assessment of how constitutionality has been undermined in Hungary, e.g. that the governing majority has been using the Fundamental Law (a constitution adopted solely by the governing majority) as a political tool.
- The report also fails to address that the competences of the Constitutional Court have been significantly restricted; and that the government has succeeded in shaping the Constitutional Court into a loyal body which rarely decides against the supposed will of the government in politically sensitive cases.
- The report does not address it with adequate emphasis that the government and the governing majority has systematically eliminated the independence of those institutions that should serve as checks on and balances to the executive branch.

4. Remarks on the potential follow-up to the Rule of Law Report

- The Commission stated several times that it would envisage national dialogues about and around the Rule of Law Report. Unsurprisingly, the Hungarian government or the governing majority have not organized any such meaningful national level discussion. Instead, the Ministry of Justice issued a "[non-paper](#)", which claimed that the Rule of Law Report's scope is "arbitrary", that it lacks "clear reference points", that its use of sources is "tendentious" and its methodology is "weak", that it applies "double standards", and that the related process did not comply "with the basic rule of law requirements related to fair hearing". This reaction highlights that there is no place for a "dialogue" any more when it comes to a government which has been dismantling the rule of law for years in a systematic manner, and sanctions are required instead.
- The fact that the Commission chose not to include in the report any recommendations for the national governments on how to tackle the problems revealed might be subject to criticism. The inclusion of recommendations would be advisable, because the Member States' willingness to

implement those could be used in the next reports to assess the trends and directions in which the given Member State is moving on the rule of law scale.

However, even if the report remains mainly descriptive without recommendations does not mean that the Rule of Law Report cannot be used for taking concrete action against Members States violating rule of law norms:

- The report provides an overview of potential cases for values-based infringement procedures that the Commission should look into. A potential way forward could be to look at the various issues holistically, exploring how they interrelate and create a pattern that amount to a systemic violation of the rule of law (cf. [this](#) academic article raising this approach).
 - The Rule of Law Report could also be used as a context for ongoing infringement actions against particular countries. However, this does not seem to be the case: for example, even though the country chapter on Hungary clearly states that civil society is under pressure, it took the Commission seven months to send a letter of formal notice to Hungary for failing to comply with the CJEU's ruling that concluded that the law stigmatising "foreign-funded" NGOs violates EU law.
 - In October 2020, we [wrote](#) that "the forthcoming hearings in the ongoing Article 7 procedure may serve as an ideal opportunity for the Council to call upon the Hungarian Government to take concrete steps on the basis of the conclusions of the report". Thus, we were of the view that, parallel to initiating infringement procedures, as a minimum, the issues of concern should be discussed during the Article 7 hearings with a view to provide concrete, actionable recommendations. However, in the end, unfortunately no Article 7 hearings have taken place since the publication of the report.
- As far as the communication of the reports is concerned, the Commission should be ready to invest more heavily into awareness-raising at the national levels, especially in those countries where there are serious rule of law problems. By way of example in Hungary where the government questions the legitimacy of the entire reporting process and where there is a distorted media landscape biased in favour of the government's narrative regarding this issue, it would be unrealistic to expect a healthy national consultation and public debate on the report. In the absence of proper access to communication channels, civil society cannot counterbalance the government's interpretation and presentation of the reporting process and its output, so investments must be made by the Commission to raise awareness about the report.

With the 2021 edition of the European Commission's Rule of Law Report just around the corner, [it would be high time to make use of the 2020 report's conclusions and take the concrete steps above. Without that happening, the Rule of Law Report will remain a diagnostic that, albeit being an important one, does not contribute to halting or reversing the rule of law backsliding in Hungary and within the EU in general.](#)