HUNGARY:
SELECTED RULE OF LAW AND HUMAN RIGHTS ISSUES AND ACTIONABLE RECOMMENDATIONS

17 June 2021

CREATING A PARALLEL STATE

The ruling majority has started to create in cardinal laws (laws that can only be amended with a two-third majority) new structures and institutions that secure in crucial areas the informal influence of the present incumbent party even if there is a change of government in the next general elections. To this end and in order to privatise immense public wealth and public universities, the concept of "public trust funds performing a public function" ("Funds") was introduced. Another facet of this trend are the recently established/redefined supervisory bodies in charge of certain state monopolies, concessions, and strategic areas such as nuclear energy.

Public trust funds performing a public function

- **Why are Funds beneficial for the public and how does the Government envision the sound financial management of public funds transferred to such entities when all the safeguards that would enable effective public scrutiny have been removed?**
- **How does the Government plan to address concerns around the notion of public funds being restricted on a constitutional level, resulting in decreased state transparency and the violation of the right to freedom of information?**

  Background: The 9th Amendment to the Fundamental Law introduced the concept of "public trust funds performing a public function" (hereafter: Funds) into the Hungarian legal system. The state has endowed the Funds with public assets of extreme value (only the value of the transferred shares of state companies is around EUR 3 Billion) and undertakes to continue to finance them generously, while ceding all founder's rights to the boards of trustees consisting of life-long members whose loyalty to the incumbent party is unquestionable. In addition, the Funds are exempted from the obligation to use their assets to carry out activities that are directly related to their public purpose. Although the founding wealth as well as the future financing of the funds are public money, due to the December 2020 9th Amendment to the Fundamental Law, these instruments lose their public nature through these structures and they are shielded from public scrutiny.

  → *Refrain from creating new public trust funds performing a public function and ensure public scrutiny and effective public control over the entities, including the repealing of their exemption from the obligation to use their assets to carry out activities that are directly related to their public purpose.*

  → *Take into account the upcoming opinion of the Venice Commission on the 9th Amendment to the Fundamental Law and amend legislation accordingly and without delay.*

Supervisory authorities removed from democratic control

- **How will the Supervisory Authority for Regulated Activities strengthen accountability, transparency and effective use of public funds, especially in light of the immense disproportionality in distribution of state advertisement purchases emanating from some of the preceding authorities?**

  Background: The recently established Supervisory Authority for Regulated Activities will be in charge of supervising (i) tobacco retail, (ii) judicial enforcement, (iii) gambling, and (iv) liquidation. All future tender invitations by the State regarding concessions will be subject to the prior approval of the new authority. Its President will be appointed by the Prime Minister for 9 years without a

public call for applications. The President will be practically irremovable and will have wide-ranging managerial and regulatory powers. The law also stipulates that only 9% of the revenues generated from supervision fees, fines, and administrative service fees are to be transferred to the central budget.

- **Is there a connection between the delays of the Paks II development and the new Atomic Energy Authority structure?**

  Background: The Hungarian Atomic Energy Authority is also redesigned in the above fashion. Russia and Hungary signed an agreement to expand Hungary's nuclear power plant. The agreement includes an EUR 10 Billion Russian loan to Hungary, but the Atomic Energy Authority has not yet issued a construction licence. The president of the Authority unexpectedly resigned in April 2021. Following this, the government submitted a bill (which was then adopted in June) that transforms the Atomic Energy Authority from a government-controlled entity into an authority with a structure similar to that of the Supervisory Authority for Regulated Activities: the Prime Minister will appoint its next, irremovable president for 9 years, without a call for applications.

→ *Revoke rules that hinder democratic control and oversight over supervisory authorities.*

RULE BY DECREE

- **How can granting veto rights to the Minister of Interior over merger/purchase of certain companies registered in the EU contribute to the effective management of COVID-19?**

  The government-declared special legal order has been practically in place since November 2020 and will likely remain in place at least until September 2021. During the special legal order, through the wide authorisation it received through the 1st, 2nd, and 3rd Authorisation Acts, the Government may issue decrees that suspend or derogate from Acts of Parliament. Since the beginning of the pandemic, the Government issued over 250 such special decrees. While a good part of these were related to the management of COVID, several serve different purposes.

  E.g. Government Decree 532/2020. (XI. 28.) grants the Minister of Interior veto powers over foreign investments that may result in dominant influence not only in truly strategic areas (e.g. armament) but also the insurance business. The decree also expands the definition of "foreign" so that it includes companies registered in the single market. This authorization was used recently to halt the planned takeover of Aegon by the Vienna Insurance Group. That the Minister of Interior will retain his veto powers over similar potential transactions in the future is ensured by the adoption of the 2nd Transitional Act that copies the expansion of the definition of "foreign" into the regular legal order for 1 year after the termination of the special legal order (an unknown date in the future).

  → *Refrain from abusing the extremely wide-ranging authorisation the Government received during the special legal order by issuing decrees that are not related to the management of the pandemic.*

INDEPENDENCE OF THE JUDICIARY

- **How does the Government plan to address the power imbalance between the Parliament-elected President of the National Office for the Judiciary and the judicial self-governing body, the National Judicial Council, with a view to judicial independence? How does the Government plan to structurally reinforce the National Judicial Council and curb the excessive powers of the President of the National Office for the Judiciary, in particular with regard to judicial leadership appointments?**

  Background: In 2011, the administration of the Hungarian court system was overhauled by the governing majority. A one-person decision-making mechanism was set up run by the President of the National Office for the Judiciary (NOJ), elected by the Parliament. The extensive powers of the NOJ's President over the court administration (including judicial appointments and promotions) were criticized by many stakeholders, because – as the Venice Commission pointed out – the NOJ "cannot be regarded as an organ of judicial self-government", which is especially problematic since the powers of the NOJ President "remain very extensive to be wielded by a single person and their effective supervision remains difficult". In principle, the self-governing body of the judiciary, the

National Judicial Council (NJC) is tasked with counterbalancing the NOJ President's powers and safeguarding the independence of the judiciary, but it cannot fulfil this role as the law provides no effective tools for a meaningful oversight over the NOJ President.

In 2018–2019, the abuse of power by the President of the NOJ in relation to judicial leadership appointments resulted in a prolonged conflict between the NOJ President and the NJC. Although this constitutional crisis subsided after the NOJ President was replaced, all the structural deficiencies that had led to the crisis still prevail, and the provisions that allowed the abuse of power by the NOJ President are still in force. Consequently, the NJC is still incapable of fulfilling its constitutional role in supervising judicial administration. For instance, the current NOJ President continues -- although on a smaller scale -- to invalidate calls for applications for judicial leadership positions without the consent of any judicial body. The current NOJ President refused the NJC's request to provide information on the bonuses paid by the previous NOJ President in 2018–2019 to judicial leaders, and the NJC is not even in the position to take any legal action with the aim of acquiring this information, as the NJC does not have legal personality.

As early as 2018, the NJC put forth detailed legislative proposals that would enable it to effectively fulfill its constitutional role, but although the laws on the judiciary have been amended several times since then, none of these recommendations have been complied with by the incumbent majority.

→ The NJC should be structurally reinforced, in line with the recommendations of the Venice Commission and the Council of the EU; it shall have a legal personality, greater budgetary autonomy, independent apparatus, a veto right whenever a call for applications for judicial leadership positions and judicial positions are invalidated by the NOJ President, and the right to comment on draft laws affecting the judiciary.

→ Provisions allowing the President of the NJO to annul calls and render appointment procedures for judicial leadership positions and judicial positions unsuccessful without the consent of any judicial body should be repealed.

- **How does the Government plan to address the issue that, in violation of the principle of the independence of the judiciary and the separation powers, judges of the Constitutional Court (elected by the Parliament) can be appointed as judges at ordinary courts without any involvement of judicial self-governing bodies and judges?**

  Background: Due to legal changes in 2019, Constitutional Court justices can be appointed as ordinary judges without the otherwise required application procedure and without any involvement of judicial self-governing bodies and judges. They are transferred immediately to the Kúria (Hungary's supreme court) after their mandate as constitutional justices comes to an end. Since constitutional justices are political appointees elected by the Parliament, this means an interference into judicial independence by other branches of power, which is especially problematic due to the newly introduced semi-precedent system that increases the Kúria's weight within the judicial system even further. Furthermore, it shall be recalled that the ruling majority has managed to pack the Constitutional Court years ago, through amending the previously existing provisions for nominating Constitutional Court judges on a consensual basis, and has shaped it into a loyal body supportive of the governing majority's agenda. Thus, Constitutional Court justices hand-picked by the ruling majority are parachuted into the top tier of the judicial branch. This kind of dilution of the Kúria's body of judges with political appointees is not a theoretical possibility: in the summer of 2020, eight constitutional justices were granted judicial appointment. Six of them were appointed without any judicial experience, one of whom became the Kúria's president shortly after.

  → The possibility of appointing members of the Constitutional Court as ordinary judges shall be abolished. The legislation shall be amended to prevent the judges already appointed under the new regulation from becoming judges at the Kúria, court leaders or members of the so-called unification panel without going through the procedures that ordinary judges are required to complete in order to fill such positions.

- **How does the Government plan to address the concerns around the fact that the new President of the Kúria was parachuted at the top of the court system by the ruling majority in blatant disregard for the manifest opposition of the judicial self-governing**

body, in violation of the independence of the judiciary and the separation of powers, while the weight of the Kúria and its President has been considerably increased?

Background: In October 2020, making use of legislative amendments introduced by the governing majority in 2019 (which during the previous Article 7 hearing the Hungarian delegation claimed were "intended to address a number of technical issues left open by the decision to withdraw the proposed reform of the administrative courts"), the ruling majority elected András Zs. Varga, a former prosecutor and Constitutional Court justice, as President of the Kúria. Justice Varga was elected after the NJC, the judicial self-governing body, issued an opinion in which it rejected his nomination by an overwhelming 13-1 majority, holding that the fact that his appointment 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".

Parachuting Justice Varga as a political appointee at the highest judicial position is all the more problematic due to the administrative powers that permit him to determine judicial careers within the Kúria. The President of the Kúria holds the same powers in relation to judicial appointments to the Kúria as the NOJ President holds with regard to judicial appointments for lower tier courts. This is all the more important, since last year, the current NOJ President raised the allowed number of Kúria judges from 92 to 113, which amounts to an increase of 23%. These positions are being filled by Mr Varga who will thus have a decisive role in shaping the composition of the judicial body at the Kúria. A recent development in this regard is the appointment to the Kúria of a State Secretary in the Ministry of Justice who does not have any judicial experience. Furthermore, recent legislative amendments vested Mr Varga with additional powers: he has the exclusive power to select members of the so-called unification panels, which have the right to determine the mandatory interpretation of the law through decisions handed down in individual cases.

In its recent communication, the UN Special Rapporteur on the independence of judges and lawyers expressed concerns over the election of Justice Varga as President of the Kúria as well, stating that his appointment "may be regarded as an attack to the independence of the judiciary and as an attempt to submit the judiciary to the will of the legislative branch, in violation of the principle of separation of powers".

→ Provisions allowing the President of the Kúria to annul calls and render appointment procedures for judicial positions at the Kúria unsuccessful without the consent of any judicial body should be repealed.

→ Rules governing the unification complaint procedure shall be modified in order to eliminate the privileged position of the President of the Kúria. Members of the unification panel shall be elected by judicial peers and the president of the unification panel shall be elected by the panel.

NON-IMPLEMENTATION OF CJEU JUDGMENTS DELIVERED AS A RESULT OF INFRINGEMENT PROCEDURES

- **What is Hungary's position regarding the primacy of EU law, especially in light of Declaration 17 annexed to the Lisbon Treaty?**

  Background: In its December 2020 judgment on the domestic legalisation by Hungary of refoulement and push-backs the CJEU found that the domestic legislation in place since July 2016 is in breach of the Return Directive and the Charter by prescribing law enforcement agencies to forcibly remove all unlawfully staying third-country nationals to the Serbian side of the border fence; unlawfully staying third-country nationals neither have the right to seek asylum, nor undergo any procedure or identification prior to removal. As Hungarian law enforcement agencies continued to carry out these measures (called "escorts" in Hungarian law) despite the CJEU judgment, Frontex decided to suspend its operations in Hungary in January 2021. On 26 February 2021, Minister of Justice Varga turned to the Constitutional Court (with only Fidesz-appointed judges sitting on the bench), requesting it to rule that the CJEU judgment violates Hungary's "inalienable right to determine its territorial unity, population, form of government and state structure", as provided by Article E) of the Fundamental Law. The latter section was inserted on 1 July 2018 as part of the "Stop Soros" package. The case, which is the first where the Hungarian government openly

questions the jurisdiction of the CJEU, is still pending. Between 17 December 2020 and 15 June 2021, more than 21,000 push-backs were carried out according to the Hungarian Police's official (!) statistics. The European Commission decided to send a reasoned opinion to Hungary due to non-compliance with the judgment on 9 June 2021.

→ Refrain from undermining the common European legal order and implement CJEU judgments without delay.

MEDIA INDEPENDENCE

- **How does the Government plan to change legislation following the initiation of an infringement procedure because of the "non-transparency" of the Media Council's refusal to renew Klubrádió's frequency?**

  Background: Radio frequencies are distributed through tendering by the Media Council, a politically homogeneous authority. The politically biased decisions in awarding frequencies are almost impossible to contest at courts as tender applications are never made public, leaving those wishing to contest the result without supporting evidence.

  → Amend legislation so that frequency tenders enjoy transparency through prescribing the publication of the entirety of applications, including points granted to applicants, by the Media Council.

- **What legislative and administrative steps have been taken in order to implement the OSCE recommendation that the "Government advertisement contracts should follow a transparent procurement process, according to a clear set of criteria, in a manner that does not inhibit fair competition, and be subject to audit by an independent body. Government information activities should strictly avoid any appearance of seeking to influence voting"?**

  Background: A complaint is pending with the European Commission that concerns the state aid provided to pro-government media outlets in the form of state advertisement. For example in 2020, calculated on list prices, cca. EUR 360 million was spent on state advertisement (by government ministries, bodies of public administration, municipal governments and state-owned enterprises), 86% (!) of which was spent in pro-government media outlets. The problematic use of state advertising is a persistent problem that has been already raised by OSCE in its report following the 2018 national elections. In this context, the finding that the elections "were characterized by a pervasive overlap between state and ruling party resources, undermining contestants' ability to compete on an equal basis" should be of particular concern.

  → At a minimum, fully implement recommendation no. 21 of the OSCE limited election observation report of 2018.

VIOLATING THE RIGHTS OF LGBTQI PEOPLE

- **How does the Government view the compliance of its anti-LGBTQI measures with Article 2 of the Treaty on European Union and also Article 19 of the Treaty on the Functioning of the European Union, according to which one of the tasks of the Member States' governments as members of the Council is to take appropriate action to combat discrimination based on among others sexual orientation?**

- **Can the government still stand by its previous statement that the December 2020 changes to the rules of adoption are not aimed at excluding LGBT persons from becoming parents?**

  Background: In the spring of 2020, the Parliament adopted a law that banned legal gender recognition, in violation of the rights of transgender people. This was followed by the 9th Amendment to the Fundamental Law in December 2020, which set out not only that "the mother is female, the father is male", but also that "Hungary shall protect the right of children to their identity in line with their sex by birth, and shall ensure an upbringing in accordance with the values based on our homeland's constitutional identity and Christian culture". This was accompanied by a

law prescribing that only married couples are allowed to adopt children, and exceptions to that can be granted only on a case-by-case basis by a Minister. This excludes same-sex couples, single persons and non-married opposite-sex couples from adoption. Finally, in June 2021, the Parliament passed Bill T/16365 on "amending laws enabling stricter action against pedophile offenders and the protection of children". The law imposes a ban in different contexts on making available to children under the age of 18 not only pornographic content, but also materials that "promote" or simply portray "deviation from gender identity aligning with one's birth sex", gender reassignment, or homosexuality. Such contexts include advertising, the provision of media content, and it will also be forbidden to conduct in schools or other educational institutions any classes or sessions on sexual culture, sexual life, sexual orientation and sexual development in a way that they are "aimed at promoting deviation from gender identity aligning with one's birth sex, gender reassignment, or homosexuality".

The Bill (which is now pending promulgation by the President of Hungary) also envisages that apart from teachers, professionals providing school-health care services, and state bodies, only a person or organization registered by the body designated by law can hold a session or organize activities on sexual culture, sexual life, sexual orientation, sexual development, the harmful effects of drug use, and the dangers of the internet. The explanatory memorandum expressly states that the purpose of this rule is to prevent NGOs and other initiatives from conducting activities that would sensitise the students to non-traditional sexual orientations or gender identities: "The proposal suggests introducing rules for school lectures and activities -- among others sexual education classes -- held by organizations with questionable professional credibility and in several cases by organizations created to represent specific sexual orientations. Representatives of certain organizations in these sessions seek to influence the sexual development of children through sensitizing programs included in an anti-discrimination awareness-raising program, which can cause serious damage to children's physical, mental and moral development. The purpose of the amendment is to ensure that lectures and activities can only be held for children by persons or organizations that are included in an official, constantly updated register. The detailed regulations are published in a decree of the Minister of Human Resources."

The Bill envisages liability for a petty offence (penalised behaviour not reaching the level of criminal liability) for both the head of the educational institution and the person conducting the session or activity, if the above rules are violated (i.e. someone not registered with the designated state body holds a session on sexual culture, sexual life, sexual orientation and sexual development). Sanctions prescribed in other laws (i.e the media law, the law on advertising, the law on national public education), including the imposition of substantial fines will be applicable if -- in breach of the new law -- materials "promoting" or simply portraying homosexuality and gender reassignment are made available for persons under 18 (while the age of consent is actually 14 in Hungary).

It must also be raised whether in light of the explanatory memorandum of the law (according to which the ban on making such materials available to children under 18 was necessary, because "there are contents that a child may misunderstand at a certain age, or that may adversely affect his or her development at that age, [...] confusing their developing ethical and moral values or their self-image and their view of the world") it is possible even in principle that the minister responsible for allowing adoption by non-married persons (including same-sex couples) would ever consider giving an exemption to a non-heterosexual person.

→ *The right of transgender people to legal gender recognition should be restored.*

→ *The respective provisions of the 9th Amendment to the Fundamental Law and the rules restricting adoption should be repealed.*

→ *Provisions of the adopted Bill* T/16365 *related to the "promotion" or portrayal of homosexuality, "deviation from gender identity aligning with one's birth sex", and gender reassignment should be repealed.*