HUNGARIAN HELSINKI COMMITTEE

POTENTIAL MILESTONES AIMED AT RESTORING THE RULE OF LAW IN HUNGARY

19 October 2022

1. RESTORE THE INDEPENDENCE OF THE JUDICIARY

Concerns regarding judicial independence persist.
(2022 European Semester, Country Specific Recommendations for Hungary)

As regards judicial independence, concerns expressed
in the context of the Article 7(1) TEU procedure initiated by the European Parliament,
as well as in previous Rule of Law Reports, remain unaddressed.
This is also the case for the relevant recommendation made under the European Semester.
(The European Commission's 2022 Rule of Law Report on Hungary)

[A]ll courts in Hungary hearing civil, administrative and criminal cases
including those relevant for the protection of the financial interests of the Union shall comply
with the requirements of independence, impartiality and being established by law
in accordance with Article 19(1) of the Treaty on European Union and the relevant EU acquis.
(Hungary's commitment in the procedure under the Conditionality Regulation)

1.1. Depoliticize court administration

Court administration is highly centralized and politicized in Hungary. Overly wide management functions are concentrated in the hands of two powerful judicial leaders: (i) the President of the National Office for the Judiciary (NOJ President) and (ii) with respect to the Kúria (the supreme court of Hungary) the Kúria President. Both are elected by the Parliament's governing majority without meaningful participation of the judiciary. The judicial self-governing body, the National Judicial Council (NJC) may issue a non-binding opinion on the appointee nominated, but cannot effectively control the process of selection, nomination and election in any way. This means that the most powerful judicial leaders are imposed on the judiciary by an external actor (the legislature) exclusively based on political considerations. In fact, the current Kúria President was elected in full disregard of the rejecting opinion issued by the NJC.[1] As highlighted by the 2022 European Semester Report's Country Specific Recommendations for Hungary (the 2022 Country Specific Recommendations), "[t]he rules on electing the President of the Supreme Court create risks of political influence over the top court of the country". Additionally, the mandate of both judicial leaders is extremely long (nine years),[2] and it does not expire with the statutory retirement age of judges. The Kúria President can even remain in office after the expiry of his/her term by the decision of one-third of MPs, enabling the current ruling majority to keep the Kúria President in office even if they constitute a minority in the Parliament.[3] The disqualification from the office of the Kúria President cannot be initiated from within the judiciary, not even in case of a gross breach of administrative powers.

[1] See: https://helsinki.hu/en/the-appointment-of-andras-zs-varga-not-even-the-un-was-provided-with-an-explanation-by-the-government/.
[2] See the thematic page of cemented public office holders who received their mandates exclusively from the current ruling majority and who will retain their positions for several years regardless of any political change: https://cementezettek.helsinki.hu/en/.
[3] For a new Kúria President to be elected, a two-thirds majority is required in the Parliament, and under the pertaining legislation, the Kúria President can continue to hold this position until a new President is elected.

a) **The rules for nominating and electing the NOJ President and the Kúria President should be changed to require the consent of the NJC.**

b) **The rules governing the term of office of the NOJ President and the Kúria President should be amended so that their mandate ends when they reach the statutory retirement age of judges.**

c) **The possibility for the Kúria President to remain in office after the expiry of his/her mandate should be removed.**

d) **The NJC should be vested with the right to initiate the disqualification from the office of the Kúria President in case of gross misconduct.**

1.2. Ensure effective control of court management powers by the National Judicial Council

The NJC is a constitutional body mandated to supervise the central administration of courts. Assigned with this task, the NJC must be capable to monitor and supervise the activities of the NOJ President and the Kúria President. The Fundamental Law requires that the NJC should supervise the administration of courts, therefore court management activities may only be considered legitimate if the law allows for the NJC to properly exercise its supervisory functions. However, the legislation has serious deficiencies that prevent the NJC from fulfilling its constitutional role, and at the same time, these raise serious doubts about the legitimacy of decisions taken by the NOJ President or the Kúria President. As confirmed by the 2022 Country Specific Recommendations "[t]he National Judicial Council continues to face difficulties in counter-balancing the powers of the President of the National Office for the Judiciary". Legislative changes should be introduced to remedy the systemic problems that obstruct the effective operation of the NJC.

a) **The NJC should be granted with legal personality and an independent apparatus with all the necessary resources (including an office and employees) to carry out its supervisory functions.**

b) **The NJC should be granted budgetary autonomy. The budget of the NJC should constitute a separate heading within the budget of the judiciary. The NJC should consent to its own budget and to any modifications thereof.**

c) **The NJC should have the power to propose legislation, and should be consulted before laws concerning the judiciary are adopted.**

d) **The NJC should have the power to challenge before the courts the administrative measures taken by the NOJ President or the Kúria President, if they fail to carry out their statutory duties or follow an unlawful practice despite the notice made by the NJC about the irregularities.**

e) **NJC members elected by the judges themselves should at all times constitute the majority of NJC members. The president of the NJC should be elected for a two-years term by secret ballots and from among its members. Ex officio members should not be eligible for the position of president of the NJC.**

1.3. Provide guarantees against manipulation with judicial careers

Administrative leaders of the Hungarian judiciary are vested with excessively wide discretionary powers in many areas, most importantly, as regards judicial careers. The NOJ President and the Kúria President have full discretion to decide (i) to render any call for appointments for judicial or judicial leadership positions unsuccessful without the consent of any judicial body, allowing them to block the appointment of any judge to a higher position; (ii) to publish a call for applications for judicial posts or

leave it vacant, without the need to justify the decision; (iii) to fill a judicial post by secondment;[4] (iv) to select judges who can hear administrative cases; and (v) to award salary bonuses without clear criteria set out by law as to its basis. These very wide discretionary powers are not limited by clear criteria and cannot be supervised by judicial self-governing bodies. The long track record of the abusive application of powers by the NOJ President, and most recently also by the Kúria President,[5] signals that the regulatory environment governing the appointment and promotion of judges is prone to abuse.

a) **Provisions allowing the NOJ President/the Kúria President to annul calls and render application procedures for judicial positions unsuccessful without the consent of any judicial body should be repealed.**

b) **The NOJ President should be obliged by law to publish a call for applications for vacant judicial posts within a brief fixed term after the post has been vacated.**

c) **The NOJ President's right to second judges should be limited by law and supervised by the NJC. The legislation should set objective criteria for the selection of judges to be seconded, the direction and grade of secondment, and the period of secondment to ensure that the NOJ President or the Kúria President may not exercise their discretionary powers in an abusive manner.**

d) **The NOJ President and the Kúria President should not have the right to assign judges dealing with administrative cases and to unilaterally withdraw the assignment. Administrative judges should be selected and appointed in the same manner as judges of other (civil or criminal) judicial sections.**

e) **Administrative judicial leaders should not have the right to award discretionary bonuses to judges. The NJC's powers should extend to all questions related to the remuneration of judges.**

f) **The NJC should be empowered to effectively exercise its supervisory powers over the decisions of the NOJ President/the Kúria President as regards judicial appointments and promotions, including the right to challenge the decisions of the NOJ President/the Kúria President in court.**

1.4. Abolish all appointments to judicial positions that circumvent ordinary application procedures

As a rule, judicial appointments should be granted in the framework of an appointment procedure. Nevertheless, the law permits a wide range of exceptions from a public appointment procedure. The list of circumstances under which an individual may obtain a judicial appointment without an application procedure includes cases where the judicial appointment is granted merely upon the request of the person concerned. As a result of a recently introduced and politically motivated change, the members of the Constitutional Court will be automatically appointed to the Kúria at their own request once their mandate as Constitutional Court judges ends (including when they resign) even if they do not have any judicial experience in the ordinary court system. Furthermore, a wide range of other legal grounds for judicial appointments without an application procedure can lead to permanent transfers from one court or one judicial position to another. The NOJ President has full discretion to award higher positions within the ordinary court system without an application procedure to judges who had been previously mandated to fulfil specific temporary assignments outside the judiciary.

[4] See: Hungarian Helsinki Committee, *Background Paper on Systemic Deficiencies of the Legal Framework and Practice of the Secondment of Judges in Hungary,* 6 September 2022, https://helsinki.hu/wp-content/uploads/2022/09/Background-Paper-on-the-Secondment-of-Judges-in-Hungary-updated-06092022.pdf.
[5] See: https://helsinki.hu/en/tribunal-established-by-sleight-of-hand/.

a) **All avenues of appointments to judicial positions that circumvent the ordinary application procedure should be abolished, including the possibility of Constitutional Court members to obtain an appointment to the Kúria at their request.**

b) **Involuntary secondments should be abolished. The law must regulate the termination of the secondment excluding the possibility of unilateral termination of the secondment by court leaders.**

c) **The discretionary power of the NOJ President to award higher judicial positions to judges previously mandated with specific assignments should be abolished.**

1.5. Ensure the right to a tribunal established by law

The system and practice of case allocations is essential for safeguarding the impartiality and transparency of court decisions and the right to a tribunal established by law. However, the legal framework of the judicial case allocation system is seriously deficient with respect to guarantees against undue intervention. As the 2022 Country Specific Recommendations for Hungary stated, "[t]he lack of transparency of the case allocation scheme does not allow parties to verify whether any undue discretion has been applied". Despite the ongoing digitalisation of court procedures, the process of case allocation is neither digitalised, nor automated, and is still reliant on direct human intervention. Case allocation is carried out by judicial leaders without any effective supervision by judicial self-governing bodies. The general rules on case allocation are too vague to sufficiently delimit the decisions of court presidents, who have full discretion to establish the case allocation scheme. The case allocation scheme can be changed without time limits, as a recent legal change removed an important safeguard prescribing a fixed one-year term for such schemes. The process of adopting or modifying the case allocation scheme is not regulated by law; procedural rules concerning the modification process fail to provide sufficient safeguards against manipulative changes. The legal framework allows for a variety of exceptions without establishing guarantees against their inappropriate application. In addition, these rules permit the simultaneous application of various parallel grounds of case allocation, which results in a complicated and non-transparent matrix of competitive grounds, granting wide discretion in the final decision. Finally, parties to a particular court proceeding cannot verify whether the case allocation scheme had been properly applied or whether there was a derogation from it, hence derogations from the scheme cannot be effectively challenged.

a) **The case allocation system should be automated and based on transparent grounds.**

b) **Rules relating to the allocation of cases should be defined for a fixed term in a process involving judicial self-governing bodies.**

c) **Any changes to the case allocation scheme or exceptions it allows should be objectively justifiable and transparent.**

d) **Parties to a case should be informed of and allowed to challenge derogations from the case allocation scheme.**

1.6. Execute judgment C-564/19 of the Court of Justice of the European Union

The Court of Justice of the European Union (CJEU) delivered a judgment on 23 November 2021 in case C-564/19,[6] declaring that the system of cooperation between the national courts and the CJEU precludes a national supreme court from declaring, following an "appeal in the interests of the law", that a request for a preliminary ruling submitted by a lower court is unlawful, as it happened in the case of a Hungarian judge who submitted a series of preliminary questions to the CJEU regarding not only the criminal case he was trying but also judicial independence in general. Following the Prosecutor General's "appeal in the interests of the law" submitted against the request for a

[6] Judgment of the Court (Grand Chamber) in Case C-564/19, 23 November 2021, ECLI:EU:C:2021:949

preliminary ruling, not only did the Hungarian Kúria rule that the judge's preliminary reference was indeed unlawful (on the ground that the questions referred were not relevant and necessary for the resolution of the dispute concerned), but the Kúria's decision was published as a precedent, which is, in essence, binding for the future adjudication of similar issues. The CJEU also found that EU law precludes disciplinary proceedings from being brought against a national judge on the ground that he or she has made a reference for a preliminary ruling to the CJEU (which happened in the particular case, although later the disciplinary procedure was halted), since the mere prospect of being the subject of such proceedings can undermine the mechanism of preliminary references and judicial independence.

Without a proper modification of the Hungarian legislative framework, the Kúria can continue to declare that a request for a preliminary ruling which has been submitted to the CJEU by a lower court is unlawful. Furthermore, on this ground, disciplinary proceedings can be brought against a national judge for making a reference for a preliminary ruling to the CJEU in relation to judicial independence, or, potentially, other politically sensitive issues.

a) **It should be declared in the Code of Criminal Procedure that the Prosecutor General is prevented from submitting an "appeal in the interests of the law" against a court order suspending the procedure to request a preliminary ruling.**

b) **It should be expressly prescribed in all the relevant procedural codes that the Kúria shall under no circumstances declare that a request for a preliminary ruling submitted by a lower court is unlawful on grounds for the assessment of which the CJEU has exclusive jurisdiction.**

2. RESTORE THE EFFECTIVE CONSTITUTIONAL REVIEW OF LAWS AND THE INDEPENDENCE OF THE CONSTITUTIONAL COURT

Questions have been raised regarding the role of the Constitutional Court, composed of members elected by Parliament without the involvement of the judiciary, in reviewing judgments of the ordinary courts.
(2022 European Semester, Country Specific Recommendations for Hungary)

2.1. Change the rules for nominating and electing Constitutional Court judges

The independence of the Constitutional Court (CC) has been severely undermined in recent years. The governing coalition changed the long-established consensus-based process for nominating justices to the CC to ensure that the governing parties, having a two-thirds majority in parliament, could fill vacancies on the bench on their own, without support from the opposition parties. The size of the CC was also increased, from 11 to 15 judges. As a result, the governing parties were able to pack the CC with loyal justices, including their former MPs, and have transformed it into a loyal body that is supportive of the Government's agenda.[7]

a) **The rules for nominating and electing CC justices should be changed to a primarily consensus-based process between governing and opposition parties. CC justices should be nominated e.g. either by a parliamentary committee composed on the basis of the principle of parity, to which governing and opposition parties can delegate an equal number of members; or by an expert committee established by said parliamentary committee. The parliamentary majority requirement for electing CC justices should be raised to a four-fifth supermajority from the current two-thirds majority requirement.**

[7] For an overview of the weakening of the constitutional oversight of legislation, see the joint submission of Amnesty International Hungary, the Eötvös Károly Institute and the Hungarian Helsinki Committee to Hungary's 3rd UPR, 25 March 2021, https://helsinki.hu/wp-content/uploads/2021/03/AIHU_EKINT_HHC_UPR2021_Hungary_RoL_web.pdf, pp. 2-4.

b) **The president of the CC should be elected by the justices themselves instead of the Parliament.**

c) **In addition to existing conflict of interest rules, the law should prescribe a four-year cooling-off period also for former Members of Parliament before being eligible as CC justices.**

2.2. Repeal the right to submit constitutional complaints by state agencies

Since December 2019, state and public authorities and bodies have had the right to submit constitutional complaints to the CC against final and binding court decisions. Organisations exercising public authority may submit a constitutional complaint if, in their view, their fundamental rights have been violated, or if their scope of competence has been unconstitutionally curtailed by a court decision. As a result, constitutional complaints can be used not only to protect people's rights against state power but also to provide constitutional protection to public authorities in their lawsuits vis-à-vis individuals. The possibility for entities exercising public authority, such as the Government itself, to bring cases before the CC opens a way for judgments delivered in politically sensitive cases to be overruled by the CC in a way that is favourable for the executive branch.[8]

a) **Legal provisions allowing state/public authorities to submit a constitutional complaint against ordinary court decisions referring to the violation of their fundamental rights or their scope of competence should be repealed, and such constitutional complaints should be explicitly excluded by law.**

3. ENSURE MEANINGFUL PUBLIC CONSULTATION ON DRAFT LAWS

Hungary scores low among the Member States in social dialogue, stakeholder engagement in developing primary law, consultation with social partners, civil society, and the use of evidence-based instruments.
(2022 European Semester, Country Specific Recommendations for Hungary)

As regards the system of checks and balances, the transparency and quality of the legislative process remain a source of concern.
(The European Commission's 2022 Rule of Law Report on Hungary)

In line with the 2022 Country Specific Recommendations for Hungary, "the quality and transparency of the decision-making process [should be improved] through effective social dialogue, engagement with other stakeholders and regular impact assessments". As pointed out by the Country Specific Recommendations as well, "[n]ational rules on the obligatory public consultation of draft legal acts and their impact assessments have been systematically disregarded" by the Hungarian government; public consultation on draft laws prepared by ministries has virtually ceased in recent years.[9] The recent amendment of Act CXXXI of 2010 on Public Participation in Preparing of Laws, adopted in the interest of reaching an agreement with the European Commission, does not offer real solutions either.

[8] See in more detail: Hungarian Helsinki Committee, *Non-Execution of Domestic and International Court Judgments in Hungary*, 2021, https://helsinki.hu/en/wp-content/uploads/sites/2/2021/12/HHC_Non-Execution_of_Court_Judgments_2021.pdf, pp. 18-20.

[9] See statistical data and an overview of how the Government circumvented and ignored consultation obligations in the joint submission of Amnesty International Hungary, the Eötvös Károly Institute and the Hungarian Helsinki Committee to Hungary's 3rd UPR, 25 March 2021, https://helsinki.hu/wp-content/uploads/2021/03/AIHU_EKINT_HHC_UPR2021_Hungary_RoL_web.pdf, pp. 13-15; and the statement of the Hungarian Helsinki Committee made during the OSCE SHDM II 2021 on democratic law-making: ensuring participation, 26 April 2021, https://helsinki.hu/en/wp-content/uploads/sites/2/2021/04/OSCE-SHDM-II-2021_HungarianHelsinkiCommittee.pdf.

The amendment introduces a weak sanctioning mechanism for when consultation is unlawfully omitted, but it does not foresee any further consequences, and so laws adopted in breach of the rules on public consultation can become/remain part of the legal system.[10] The issue can only be resolved by putting in place effective sanctions preventing drafts from becoming laws if the provisions concerning public consultation are violated.

a) **The Rules of Procedure of the Parliament should prescribe that Bills submitted by the Government that fall under the compulsory public consultation mechanism must include an impact assessment, a summary of the consultation process, as well as the typified summary of rejected suggestions received in the framework of the consultation process, with the reasoning for the rejection. Should the Bill not include these, it shall not be put on the Parliament's agenda ("*tárgysorozatba vétel*").**

b) **The Rules of Procedure of the Parliament should prescribe that Bills submitted by the Government that do not fall under the compulsory public consultation mechanism under Article 5 (3)-(4) of Act CXXXI of 2010 must include a detailed reasoning for why in the Government's view no public consultation was needed (or allowed) regarding that specific piece of legislation. Should the Bill not include this, it shall not be put on the Parliament's agenda ("*tárgysorozatba vétel*").**

c) **It should be prescribed on a legislative level that the omission of obligatory public consultation or the failure to provide detailed reasoning for not conducting public consultation constitutes sufficient reason for the annulment of the adopted law (both governmental and ministerial decrees and Acts of Parliament) on procedural grounds by the Constitutional Court.**

4. RESTRAIN THE GOVERNMENT'S EMERGENCY POWERS

The Government has been using its emergency powers extensively, also in areas not related to the COVID-19 pandemic as initially invoked. (The European Commission's 2022 Rule of Law Report on Hungary)

The Government acquired excessive regulatory powers first during the COVID-19 pandemic: it declared a "state of danger", while the governing majority transformed the legislative framework in a way that the Government had a *carte blanche* mandate to override any Act of Parliament via emergency government decrees once a state of danger was declared.[11] Several emergency decrees raised rule of law and human rights concerns, or had nothing to do with the containment of the pandemic; while the Constitutional Court failed to review challenged decrees in a timely manner. In May 2022, the governing majority adopted the 10th Amendment to the Fundamental Law, which authorised the Government to declare a state of danger in the case of an "armed conflict, war or humanitarian disaster in a neighbouring country" as well. The Government made use of the possibility to declare the new type of state of danger instantly, essentially using the war in Ukraine as a pretext to keep its excessive regulatory powers and maintain a "rule by decree" system.[12]

[10] For a detailed assessment of the amendment, see: Amnesty International Hungary - Hungarian Helsinki Committee - K-Monitor - Transparency International Hungary, *Brief assessment and recommendations in relation to the bills submitted by the Hungarian Government "in the interest of reaching an agreement with the European Commission"*, 27 July 2022, https://helsinki.hu/en/wp-content/uploads/sites/2/2022/07/HU_RRF_Bills_assessment_recs.pdf.

[11] For more details, see: Hungarian Helsinki Committee, *Overview of Hungary's emergency regimes introduced due to the COVID-19 pandemic*, 1 June 2022, https://helsinki.hu/en/wp-content/uploads/sites/2/2022/06/HHC_Hungary_emergency_measures_overview_01062022.pdf.

[12] See: https://helsinki.hu/en/information-note-on-the-proposed-10th-amendment-of-the-fundamental-law/.

Provisions of the 9th Amendment of the Fundamental Law and accompanying legislation that will enter into force on 1 November 2022 will transform the legislative framework for special legal orders, including the state of danger, and will cement existing problems. As a new element, the Government will need an authorization from the Parliament to extend the state of danger after an initial 30-day period, but at the same time the automatic oversight of the Parliament over individual decrees will be removed from the constitution: emergency decrees (which can override Acts of Parliament) will not need the approval of the Parliament to stay in force after an initial 15-day period. This basically cements the framework created in the past years via a series of "authorization acts", which removed parliamentary control over individual emergency decrees against the spirit of the constitutional framework. In addition, the new provisions will include a similar *carte blanche* mandate as the current ones, and provide for an excessively wide scope in terms of the content of the emergency decrees.

a) **The Parliament should be able to authorize the Government to extend the state of danger for a maximum of 90 days per occasion.**
b) **It should be re-introduced as a requirement into the Fundamental Law that emergency government decrees in a state of danger can remain in force after an initial period only with the Parliament's approval. The wording of the law should make it clear that the Parliament has to approve the individual decrees, and so cannot give the Government an open-ended authorization to issue and keep in force emergency decrees of yet unknown content.**
c) **Provisions providing the Government a *carte blanche* mandate in terms of issuing emergency decrees in a state of danger should be revised: the excessively wide scope of the potential content of the emergency decrees should be restricted.**
d) **Prescribe that the Constitutional Court shall review emergency decrees brought before it within a short and fixed deadline, to ensure timely constitutional review. The possibility of *actio popularis* constitutional review requests should be re-introduced for emergency decrees.**