HUNGARIAN HELSINKI COMMITTEE

Hungary: Continued Backsliding on Rule of Law and Human Rights

Selected Developments and Recommendations for the Council Hearing on 18 November under Article 7(1) TEU

17 November 2022

Corruption in Hungary has been in the forefront of the discussions about the country's rule of law backsliding in the past months. However, rule of law concerns with regard to Hungary are much more diverse, and while the Hungarian Government has been negotiating with the European Commission in the framework of the conditionality mechanism about anti-corruption measures, it continued to violate rule of law and human rights standards in areas also beyond those covered by this process. These violations in turn fall under the process initiated under Article 7(1) TEU in relation to Hungary in 2018.

Ahead of the Council's next hearing under Article 7(1) TEU, in this paper we summarise the main rule of law and human right developments that emerged since the last Council hearing in May 2022 and that fall under the Hungarian Helsinki Committee's mandate, proposing points of inquiry and recommendations in the six selected areas.

1. CONTINUED ATTACKS AGAINST THE INDEPENDENCE OF THE JUDICIARY

- **How does the Government intend to fulfil its general commitment made in the framework of the conditionality mechanism that all Hungarian courts shall comply with the requirements of independence, impartiality and being established by law?**
- **How does the Government intend to ensure that breaches of existing laws in relation to judicial appointments are remedied?**
- **How does the Government intend to counter the chilling effect on the freedom of expression of judges in light of the recent smear campaigns against members of the National Judicial Council?**

Background: Although the Government made a general commitment in the framework of the conditionality mechanism that "all courts in Hungary hearing civil, administrative and criminal cases (…) shall comply with the requirements of independence, impartiality and being established by law", measures introduced or proposed so far in the framework of the conditionality mechanism do not envisage any steps that would be aimed at restoring the independence of the judiciary and remedying long-known problems pertaining to court administration and judicial careers.

Accordingly, the concerns in relation to the independence of the judiciary we raised in May 2022 are still valid. Court administration is highly centralized and politicized, and overly wide management functions are concentrated in the hands of two political appointees: the President of the National Office for the Judiciary (NOJ President) and the President of the Kúria (the apex court of Hungary) – both elected by the Parliament without the meaningful participation of judicial self-governing bodies. At the same time, the National Judicial Council (NJC, the highest-ranking self-governing body of judges) is heavily hindered in performing its constitutional task of overseeing the administration of courts. In

the past years, the government increased the weight of the Kúria, and took a series of legislative and court administration steps (including court packing) that aimed to increase the likelihood of the adjudication of politically sensitive cases in a manner that is favourable for the Government. One important related development since the last Article 7(1) hearing is that it was revealed that the Kúria President appointed several justices in breach of procedural rules. Irregularly appointed justices included a former state secretary of the Ministry of Justice, who was appointed to the Kúria without any prior experience as a judge. A recent research revealed that the current legislative framework allows the Kúria President and the NOJ President to manipulate judicial careers, select and transfer judges in an arbitrary manner and circumvent the ordinary route for appointing judges. Furthermore, Hungary has still not executed the judgment of the Court of Justice of the European Union (CJEU) delivered in November 2021 in case C-564/19, and so the Kúria is still allowed to declare requests for a preliminary ruling unlawful, and disciplinary proceedings can be brought against the judge making a request.

Attempts to exert chilling effect on the freedom of expression of judges continued as well. In August, the NJC's spokesperson voiced his concerns over government overreach aimed at swaying courts in an article by the Guardian, which drew severe attacks against him from the pro-government propaganda media. In November, another massive smear campaign was launched by government representatives and the pro-government media against the spokesperson and another sitting judge, also member of the NJC. The judges were attacked and their independence was questioned for accepting an invitation to meet the ambassador of the USA in their capacity as representatives of the NJC, to talk about the situation of judges and judicial independence in Hungary.

Recommendations:

- ➔ *Strengthen the National Judicial Council so that it is able to exercise effective control over the administration of courts and specifically the President of the National Office for the Judiciary.*
- ➔ *Ensure the accountability of the Kúria President by judicial self-governing bodies for breaching the law in his capacity as administrative court leader.*
- ➔ *Provide guarantees against manipulation with judicial careers and judicial appointments circumventing ordinary application procedures: (i) Provide for adequate domestic legal remedy against unlawful judicial appointments at the Kúria for parties to a lawsuit in whose cases unlawfully appointed Kúria judges adjudicate. (ii) Abolish the possibility of Constitutional Court justices to secure an appointment to the Kúria at their own request. (iii) Amend the system of judicial secondments so that it excludes the arbitrary transfer of judges.*
- ➔ *Establish guarantees with respect to case allocation within courts.*
- ➔ *Execute the judgment of the CJEU delivered in case C-564/19, so that Hungarian judges can submit requests for preliminary references without risking disciplinary procedures.*
- ➔ *Eliminate undue interference and retaliatory measures against judges voicing criticism in relation to the independence of the judiciary; protect the integrity of the NJC's judge members by taking effective measures to guarantee that they can exercise their statutory rights and obligations without any undue interference.*

2. LACK OF MEANINGFUL CONSEQUENCES FOR BREACHING THE RULES OF PUBLIC CONSULTATION ON DRAFT LAWS

- **How does the Government intend to prevent that laws that are adopted in violation of public consultation rules become/remain part of the legal system?**

Background: As pointed out by the 2022 European Semester's Country Specific Recommendations, "[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. The European Commission's 2022 Rule of Law Report also pointed out that "the transparency and quality of the legislative process remain a source of concern".

However, 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. The amendment, adopted in October, 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. It must be pointed out that the amendment itself was not put up for public consultation, nor were the other drafts of all other laws the Government submitted and the Parliament passed in order to comply with the commitments made by Hungary in the framework of the conditionality procedure.

Recommendations:

- ➔ *Prescribe that Bills submitted by the Government can be put on the Parliament's agenda only if they include an adequate and duly reasoned documentation of the consultation process (including 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), or a detailed reasoning on why in the Government's view consultation was not needed (or allowed) under the existing law.*
- ➔ *Prescribe 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.*

3. THE GOVERNMENT'S CONTINUED EXCESSIVE REGULATORY POWERS

- **What guarantees will be introduced to ensure that the Government will not abuse its *carte blanche* mandate granted to it in a state of danger in the future and does not issue emergency government decrees that are not related to the war in Ukraine?**
- **What guarantees will be introduced to ensure the effective and timely constitutional review of emergency government decrees by the Constitutional Court?**

Background: 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. Several emergency decrees raised rule of law and human rights concerns, or had nothing to do with the containment of the pandemic, and 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.

Provisions of the 9th Amendment to the Fundamental Law and accompanying legislation that entered into force on 1 November 2022 transformed the legislative framework for special legal orders, including the state of danger, and cemented existing problems. As a new element, the Government needs an authorization from the Parliament to extend the state of danger after an initial 30-day period; this authorization can be given for a maximum of 180 days per occasion, but can be repeated without limitation. At the same time, the automatic oversight of the Parliament over individual decrees has been removed: emergency decrees (which can override Acts of Parliament) do not need the approval of the Parliament any more 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. The new provisions include a similar *carte blanche* mandate as the one created during the pandemic, and provide for an excessively wide scope in terms of the content of the emergency decrees. As of 1 November 2022, the Government declared a new state of danger under these new rules, with a reference to the war on Ukraine, and there is already a bill pending before the Parliament that will authorize the Government to extend the state of danger with the maximum 180 days.

Recommendations:

- ➔ *Refrain from abusing the extremely wide-ranging authorisation the Government received during the state of danger by issuing decrees that are not related to the war in Ukraine.*
- ➔ *The Parliament should be able to authorize the Government to extend the state of danger for a maximum of 90 days per occasion.*
- ➔ *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.*
- ➔ *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.*
- ➔ *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.*

4. ATTEMPTS TO EXERT CHILLING EFFECT ON CIVIL SOCIETY ORGANISATIONS

- **What steps does the Government envisage to halt and counter attacks and smear campaigns against independent civil society organisations, and the chilling effect of these?**
- **How does the Government justify those elements of the LexNGO 2021 that violate certain fundamental rights of the concerned civil society organisations by making them subject of audits by the State Audit Office without adequate justification and legal safeguards, and how can the respective law be reconciled with the constitutional mandate of the State Audit Office?**
- **When will the Government comply with the judgment of the CJEU in case C-821/19, and initiate the abolishment of the "Stop Soros" law that criminalises assistance to asylum-seekers in submitting an asylum claim?**

Background: Laws violating the rights of and exerting a chilling effect on civil society organisations (CSOs) are still in force: (i) Act XLIX of 2021 on the Transparency of Organisations Carrying out Activities

Capable of Influencing Public Life (LexNGO 2021) and accompanying amendments violate the rights of certain CSOs by making them subject of audits by the State Audit Office without adequate justification and legal safeguards, which cannot be reconciled with the constitutional mandate of the State Audit Office. (ii) The "Stop Soros" law that criminalises assistance to asylum-seekers in submitting an asylum claim if that proves to be unfounded later remains in effect, even though in 2021 the CJEU ruled that the provisions in question violate EU law.

Smear campaigns against human rights and anti-corruption CSOs by government representatives and pro-government media have also continued. As a part of that, the narrative that CSOs receiving funding from abroad may pose a national security threat has resurfaced. For example, at the parliamentary committee hearing of the new Minister responsible for national security services in May, the head of the governing Fidesz parliamentary group stated that "there are CSOs involved in Hungarian domestic politics that are funded from abroad and yet carry out their domestic political activities here, or there are media outlets that are clearly in the service of foreign entities. Identifying these, or at least being aware of them, will be essential if we are talking about defending sovereignty." Such remarks are especially worrying in light of the fact that in the governmental structure set up after the national elections in April, the oversight of all national security agencies is concentrated in the hands of Minister Antal Rogán, who is at the same time responsible for government communication.

Recommendations:

- ➔ *Government and governing party representatives should refrain from making statements that are capable of exerting a chilling effect on civil society.*
- ➔ *Repeal Act XLIX of 2021 on the Transparency of Organisations Carrying out Activities Capable of Influencing Public Life, making certain CSOs subject to audit by the State Audit Office.*
- ➔ *Implement the CJEU judgment in case C-821/19 and repeal the "Stop Soros" law, criminalising assistance to asylum-seekers in submitting an asylum claim.*

5. VIOLATING THE RIGHTS OF ASYLUM-SEEKERS, REFUGEES AND MIGRANTS: NON-COMPLIANCE WITH EU LAW

- **How does the Government justify the proposed extension of the "embassy system" that restricts access to asylum in breach of EU law, by referring to the COVID pandemic, while it ended the state of danger due to COVID already on 1 June 2022?**
- **How does the Government justify non-compliance with the CJEU judgments?**

Background: Pursuant to the currently applicable legal framework on accessing the asylum procedure, it has been almost impossible to apply for asylum on the territory or at the border of Hungary since May 2020. There is a compulsory precondition for those seeking asylum to submit a statement of intent at the Hungarian embassy in Belgrade or Kyiv. The European Commission is of the view that by introducing this "embassy system", Hungary unlawfully restricted access to the asylum procedure and referred Hungary to the CJEU. While the case is still pending, the Government proposed to extend the validity of the "embassy system" until 31 December 2023, referring to the COVID epidemic situation, claiming that persons arriving from outside the country's borders in uncontrolled circumstances pose an outstanding risk of infection. Maintaining a system that seriously restricts access to asylum in breach of EU law is unjustified, especially since the epidemiological entry restrictions were lifted on 7 March 2022 and the Government ended the state of danger due to COVID pandemic on 1 June 2022.

Furthermore, a recent study shows that Hungary did not properly implement over two-thirds of CJEU judgments concerning asylum and migration. The most obvious example is judgment C-808/18, concerning the unlawful Hungarian practice of pushbacks, which was already referred back to the CJEU by the European Commission, due to the continued non-compliance with judgment. Since the original CJEU judgment was delivered in December 2020, over 211,677 pushbacks have been carried out.

Recommendations:

- ➔ *Withdraw the legislative proposal to extend the validity of the "embassy system".*
- ➔ *Take legislative and administrating measures to bring the Hungarian legal framework on accessing the asylum procedure in line with EU law.*
- ➔ *Refrain from undermining the common European legal order and implement CJEU judgments without delay.*

6. CURTAILING THE RIGHT TO STRIKE AND ATTEMPTING TO EXERT CHILLING EFFECT ON TEACHERS VOICING CRITICISM

- **How does the Government intend to restore the right to strike of teachers?**
- **How does the Government intend to ensure that teachers are not reprimanded for exercising their fundamental rights?**

Background: One of the emblematic examples of the inappropriate use of emergency government decrees was the Government's interference with the strike of teachers for better working conditions in public education. Teachers' trade unions announced plans to strike as of 16 March 2022, and were in negotiation with the respective Ministry about the exact "necessary minimum services" to be provided during a strike. The law prescribes that if the parties cannot agree on the minimum services, they can request the court to establish what services must be provided during the strike. The teachers were about to turn to the court to settle the dispute with the Ministry, when on 11 February 2022, the Government issued an emergency decree which determined the "necessary minimum services" in such a broad manner that made a meaningful and at the same time lawful strike impossible. The decree restricted the rights of teachers disproportionately without a legitimate aim and prevented them from seeking meaningful judicial remedy.

The rules curtailing the right to strike are still in force (as an Act of Parliament), and prompted teachers throughout Hungary to voice their concerns via other means. In addition to demonstrations organised by students, parents and teachers, several teachers have been practicing civil disobedience in the form of not taking up work for limited periods of time in the autumn semester. Many teachers who participated in the civil disobedience received warning letters from the state school districts. This culminated into five teachers of the Kölcsey Ferenc Secondary School being dismissed by the school district for taking part in the civil disobedience. The potential of this step to have a chilling effect on teachers protesting was exacerbated by the fact that one of the teachers dismissed is a widely known representative of a teachers' movement which has been advocating for changes in the public education system for years.

Recommendations:

- ➔ *The right to strike should be fully ensured also for teachers.*
- ➔ *It should be ensured that the state and public administration agencies refrain from actions that curtail the freedom of expression of teachers, and from any action that might exert a chilling effect on their freedom of expression.*