



RULE OF LAW BACKSLIDING IN HUNGARY

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Democratic law-making, Independence of the judiciary, Right to a fair trial

The Hungarian Helsinki Committee (HHC), a human rights non-governmental organisation based in Budapest, Hungary, wishes to draw the attention of the Organisation for the Security and Cooperation in Europe (OSCE) to the persisting rule of law deficiencies in Hungary.

Since 2010, the Hungarian government has been exploiting its constitutional supermajority to systematically undermine the rule of law in Hungary. The government and the governing parties have undermined the independence of the judiciary and the role of independent institutions as checks and balances vis-a-vis executive political power, created an unfair election system, curtailed the freedom of the media, facilitated systemic corruption, undermined academic freedom, attacked civil society organisations, and violated the human rights of multiple groups while using a smoke screen of hate propaganda (most recently against LGBTQI+ people) and anti-EU rhetoric to cover up rule of law violations. Throughout the years, international institutions ranging from the various bodies of the UN, the Council of Europe, OSCE/ODIHR and the EU have raised concerns about various aspects of rule of law backsliding in Hungary. Finally, in December 2022, EU Member States decided to put significant financial pressure on the Hungarian government by triggering the EU conditionality mechanism,¹ and by linking the country's access to EU cohesion funds and the Recovery and Resilience Facility to fulfilling various rule of law and fundamental rights criteria related to the independence of the judiciary, anti-corruption, academic freedom, and the rights of LGBTQI+ people and asylum-seekers.

Certain legislative steps were taken to access EU funds, but the tangible and sustained results of these measures are yet to be seen. Several required anti-corruption measures have not been implemented yet or have been complied with only partially, while the issues regarding the rights of LGBTQI+ people and asylum-seekers were not addressed at all. The judicial reform package adopted in May 2023 brought important changes, but its compliance with EU requirements remains deficient, and certain factors can pose an inherent risk to the functioning of the new legal framework. Moreover, the shortcomings of the judicial reform also signal that the Government lacks a true commitment to restoring the rule of law.

This is reinforced by the fact that none of the recommendations beyond the ones concerning the judiciary that were put forth by the European Commission (EC) in its 2022 Rule of Law Report were implemented by Hungary.² There has been no progress in most areas covered by the procedure under

¹ Council Implementing Decision (EU) 2022/2506 of 15 December 2022 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary

² Cf.: European Commission, *2023 Rule of Law Report – Country Chapter on the rule of law situation in Hungary*, https://commission.europa.eu/system/files/2023-07/40_1_52623_coun_chap_hungary_en.pdf, p. 2.

Article 7(1) TEU launched in relation to the country.³ Changes to the anti-corruption framework and to the judicial system happen in an environment that is characterized by a dismantled system of checks and balances, where the Government continues to have excessive regulatory powers and where legal certainty is lacking, where the non-execution of both domestic and international court judgments is a recurring issue, where independent civil society continues to be under pressure, and where various vulnerable groups face rights violations without independent institutions being capable or willing to protect their rights.

1. Lack of democratic law-making

As highlighted by the EC's 2023 Rule of Law Report, the regulatory environment in Hungary is "unpredictable" in general, with stakeholders expressing concerns over the frequent changes in the legislation and the often low quality of law-making. This undermines legal certainty, results in the violation of human rights, and "also interfer[s] with the operation of businesses in the single market".⁴ This is coupled with the Government's excessive emergency powers, the continued lack of meaningful public consultation on draft laws, and the deficiencies of the legislative process in the Parliament. These go against the requirements set out by OSCE/ODIHR⁵ as well.

1.1. The Government's excessive regulatory powers under the state of danger

The Government continues to have excessive emergency regulatory powers, and continues to use its mandate to issue emergency decrees extensively and in an abusive manner.⁶ The Government first acquired excessive emergency powers with a view to the pandemic in the spring of 2020: it declared a "state of danger", a special legal order regime, 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.⁷ The Government has been maintaining a "rule by decree" system ever since, with only a few months of intermission, most recently using the war in Ukraine as a pretext for keeping its excessive regulatory powers. The constitutional and statutory framework governing special legal order regimes was amended as of November 2022, and these amendments cemented the very problematic practices developed during the pandemic in relation to the state of danger:⁸ the Government continues to have a *carte blanche* mandate (also to suspend or restrict most fundamental rights beyond the extent permissible under ordinary circumstances); there is no automatic and regular parliamentary oversight over individual emergency decrees; and the effective constitutional review of the emergency decrees is not ensured.

³ Cf.: Amnesty International Hungary et al., *Selected recommendations for Hungary in the Article 7(1) TEU procedure*, May 2023, https://helsinki.hu/en/wp-content/uploads/sites/2/2023/05/HU_Article7_CS0_recs_May2023.pdf.

⁴ European Commission, *2023 Rule of Law Report – Country Chapter on the rule of law situation in Hungary*, https://commission.europa.eu/system/files/2023-07/40_1_52623_coun_chap_hungary_en.pdf, pp. 1. and 30-33.

⁵ Cf.: ODIHR Brief: *Guiding Principles of Democratic Lawmaking and Better Laws*, 2023, <https://www.osce.org/files/f/documents/c/a/552682.pdf>.

⁶ For a comprehensive overview, see: Hungarian Helsinki Committee, *Government gains excessive powers from forever renewable state of danger*, 24 February 2023, https://helsinki.hu/en/wp-content/uploads/sites/2/2023/02/HHC_Hungary_state_of_danger_24022023.pdf.

⁷ For the timeline, see: Hungarian Helsinki Committee, *Overview of Hungary's Emergency Regimes Introduced due to the COVID-19 Pandemic. Update of 1 June 2022*, https://helsinki.hu/en/wp-content/uploads/sites/2/2022/06/HHC_Hungary_emergency_measures_overview_01062022.pdf.

⁸ A detailed analysis of the changes, covering also the special order regimes beyond the state of danger, is available here: Gábor Mészáros: *Exceptional Governmental Measures without Constitutional Restraints*, https://helsinki.hu/en/wp-content/uploads/sites/2/2023/01/Meszoros_special_legal_order_02112022.pdf.

The practice of regularly adopting emergency government decrees for purposes not related to the cause of the state of danger continues as well.⁹

The state of danger declared with a reference to the war in Ukraine is currently extended until 25 November 2023, but there are already plans to extend it again with an additional 180 days.¹⁰ As it was also pointed out by the EC's 2023 Rule of Law Report, "[l]egal certainty has been undermined by [...] the extensive and prolonged use of the Government's emergency powers",¹¹ and the current legal framework and practice is in stark contrast with the requirements set out by the Venice Commission.¹²

1.2. Lack of meaningful public consultation on draft laws

According to the 2023 European Semester's Country Specific Recommendation, "[s]ocial dialogue remains among the weakest in the EU and further deteriorated recently" in Hungary.¹³ The transparency and quality of the legislative process and the efficiency of public consultations in practice remain a source of concern despite the amendments to the rules of public consultation that were adopted in 2022 with the aim of complying with milestones set under the Recovery and Resilience Plan. Remaining issues include e.g. that the range of exceptions when draft laws do not have to or must not be subject to public consultation remains wide, and the quality of impact assessments is often inadequate. Despite the new rules, several significant laws were not published for public consultation recently, and the Government is extremely reluctant to accept the opinions received.¹⁴ The most fundamental (regulatory) flaw is that laws adopted in breach of the rules on public consultation can still become/remain part of the legal system.

1.3. Deficiencies of the parliamentary process

The legislative process in the Parliament has been "instrumentalized" as well.¹⁵ Bills, often lengthy omnibus proposals, can be adopted within a very short timeframe. The governing majority regularly amends bills substantially in the very last phase of the legislative process, after the detailed parliamentary debate has already taken place. The governing majority regularly obstructs discussions in parliamentary committees, and a unilaterally established super committee, the Legislative Committee, which is tasked with deciding which motions reach the agenda and so are debated by the Parliament serves as a pre-filtering entity that successfully thwarts any item to even reach debate.¹⁶

⁹ For examples from 2022 and 2023, see: Hungarian Helsinki Committee, *Government gains excessive powers from forever renewable state of danger*, 24 February 2023, https://helsinki.hu/en/wp-content/uploads/sites/2/2023/02/HHC_Hungary_state_of_danger_24022023.pdf, pp. 6-7.

¹⁰ <https://kormany.hu/dokumentumtar/2022-evi-xlii-torveny-modositasarol-szolo-torvenytervezet-1>

¹¹ European Commission, *2023 Rule of Law Report – Country Chapter on the rule of law situation in Hungary*, https://commission.europa.eu/system/files/2023-07/40_1_52623_coun_chap_hungary_en.pdf, pp. 1. and 31-32.

¹² European Commission for Democracy Through Law (Venice Commission), *Report – Respect for Democracy, Human Rights and the Rule of Law During States of Emergency: Reflections*, CDL-AD(2020)014, 19 June 2020, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2020\)014-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)014-e). See especially paras 10., 14., 65., 81., 84. and 87-88.

¹³ <https://data.consilium.europa.eu/doc/document/ST-11147-2023-INIT/en/pdf>, para. 36.

¹⁴ In more detail, see: Amnesty International Hungary et al., *Assessment of compliance by Hungary with conditions to access European Union funds*, April 2023, https://helsinki.hu/en/wp-content/uploads/sites/2/2023/04/HU_EU_funds_assessment_Q1_2023.pdf, pp. 40-45.; K-Monitor, *Public consultation with the Orbán government – Is it worth it?*, 13 June 2023, <https://tinyurl.com/tzjacezv>.

¹⁵ Viktor Zoltán Kazai, *The Instrumentalization of Parliamentary Legislation and its Possible Remedies: Lessons from Hungary*, *Jus Politicum*, n° 23, <https://juspoliticum.com/article/The-Instrumentalization-of-Parliamentary-Legislation-and-its-Possible-Remedies-Lessons-from-Hungary-1309.html>

¹⁶ In more detail, see the Hungarian Helsinki Committee's statement submitted for the Supplementary Human Dimension Meeting II 2021 – Democratic Law-Making: Ensuring Participation at https://helsinki.hu/en/wp-content/uploads/sites/2/2021/04/OSCE-SHDM-II-2021_HungarianHelsinkiCommittee.pdf.

Parliamentary disciplinary proceedings are systematically used to restrict the freedom of expression of opposition MPs in an arbitrary, discriminatory manner.¹⁷

2. Deficiencies regarding the independence of the judiciary

In order to comply with four “super milestones”, set by the Council of the European Union for Hungary to access funds under the Recovery and Resilience Facility, and identical preconditions set for accessing cohesion funds, aimed at restoring the independence of the judiciary, the Hungarian Parliament adopted a judicial package in May 2023, albeit in a procedure that breached the rules of law-making.¹⁸ The Government claims to have met all the requirements, however, in reality, three out of the four super milestones are implemented defectively on a legal level.¹⁹

The effectiveness and sustainability of the adopted changes largely remain to be seen. Moreover, although little time has passed since the adoption of the judicial package, there have already been attempts to derail the changes prescribed in the new law.²⁰

It has to be emphasized that the milestones did not address all of the concerns around judicial independence in Hungary. Outstanding issues include that as regards lower courts, the lack of transparency of case allocations remains a source of concern, as also recognized by the EC’s 2023 Rule of Law Report.²¹ The role of the captured Kúria (Hungary’s top court) and its President as well as the Kúria’s capability to control lower courts through the obligatory interpretation of the law poses a significant risk as well. Finally, the freedom of expression of Hungarian judges has been repeatedly undermined in the past years, with judges speaking up for judicial independence targeted by smear campaigns and administrative measures, resulting in a chilling effect among judges.²²

3. Lack of an independent Constitutional Court

The Constitutional Court’s independence has been severely undermined in the past years. As part of this process, the governing parties changed the long-established consensus-based process for nominating Constitutional Court justices, and increased the size of the court from 11 to 15 judges.²³ As

¹⁷ For more details, see the communication of the Hungarian Civil Liberties Union and the Hungarian Helsinki Committee, submitted to the Committee of Ministers of the Council of Europe in November 2021 in the *Karácsony and Others v. Hungary* case: https://helsinki.hu/en/wp-content/uploads/sites/2/2021/11/HCLU_HHC_Karacsony_v_Hungary_Rule_9_communication_12112021.pdf.

¹⁸ Erika Farkas – András Kádár, Restoring the Rule of Law by Breaching it: Hungary’s Judicial Reform and the Principle of Legality, *Verfassungsblog*, 10 July 2023, <https://verfassungsblog.de/restoring-the-rule-of-law-by-breaching-it/>

¹⁹ See the detailed assessment of Act X of 2023 on the Amendment of Certain Laws on Justice related to the Hungarian Recovery and Resilience Plan prepared jointly by Amnesty International Hungary, the Eötvös Károly Institute and the Hungarian Helsinki Committee: https://helsinki.hu/wp-content/uploads/2023/05/Assessment_of_the_Judicial_Reform_052023.pdf, https://helsinki.hu/wp-content/uploads/2023/05/Compliance_Judicial_Milestones_20230523.pdf.

²⁰ For details, see: Hungarian Helsinki Committee, *Updated summary assessment on Hungary’s compliance with the 4 super milestones aimed at restoring the independence of the judiciary*, 9 October 2023, <https://helsinki.hu/en/wp-content/uploads/sites/2/2023/10/update-judicial-milestones-09102023.pdf>, pp. 3-4.

²¹ European Commission, *2023 Rule of Law Report – Country Chapter on the rule of law situation in Hungary*, https://commission.europa.eu/system/files/2023-07/40_1_52623_coun_chap_hungary_en.pdf, pp. 2. and 6.

²² For a detailed account of the factors that can pose an inherent risk to the functioning of the new legal framework, see: Amnesty International Hungary – Eötvös Károly Institute – Hungarian Helsinki Committee, *Assessment of Act X of 2023 on the Amendment of Certain Laws on Justice related to the Hungarian Recovery and Resilience Plan in light of the super milestones set out in the Annex to the Council Implementing Decision on the approval of the assessment of the recovery and resilience plan of Hungary*, 22 May 2023, https://helsinki.hu/wp-content/uploads/2023/05/Assessment_of_the_Judicial_Reform_052023.pdf, V. Future Risks and Prospects (pp. 12-17.).

²³ See in detail: *Stating the Obvious – Rebutting the Hungarian Government’s response to the Reasoned Proposal in the Article 7 procedure against Hungary (A reaction paper by NGOs)*, 18 October 2019, https://www.helsinki.hu/wp-content/uploads/NGO_rebuttal_of_Article_7_Hun_gov_info_note_18102019.pdf, p. 5.

a result, the governing parties were able to pack the Constitutional Court with loyal justices, including their former MPs, and have transformed it into a loyal body that is supportive of the Government's agenda, and regularly rules in favour of the Government in politically sensitive cases.²⁴

4. Lack of implementation of domestic and European court decisions

4.1. Non-execution of domestic court decisions

As raised also by the EC's 2022 Rule of Law Report, there are "cases where state bodies refuse to execute decisions of the domestic courts; several of these concern access to documents".²⁵ One of the systemic problems contributing to this is the lack of effective and genuinely coercive enforcement tools: the sanction regime has no deterrent/dissuasive effect, and the enforcement (bailiff) proceedings are excessively long.²⁶

Decisions of the Constitutional Court are not always implemented either. At the time of submitting the present statement, there were 12 decisions in which the Constitutional Court declared that a legislative omission resulted in the violation of the Fundamental Law, but the Parliament has failed to remedy the situation. The court-set deadline has expired in 11 of these cases, the oldest one in 2013.²⁷

4.2. Non-implementation of European court judgments

As pointed out by the EC's 2023 Rule of Law Report as well, the "ineffective implementation by state authorities of the judgments of European courts remains a source of concern".²⁸

Hungary's record of implementing European Court of Human Rights (ECtHR) judgments remains poor. On 1 January 2023, Hungary had 43 leading judgments of the ECtHR pending implementation, and the rate of leading judgments from the past 10 years that remain pending was at 76%, an increase to 2022, the highest within the EU and the fourth highest within the Council of Europe.²⁹ Pending leading cases concern crucial human rights issues, including unchecked secret surveillance, freedom of expression of judges, excessive length of judicial proceedings, whole life imprisonment, police ill-treatment, and discrimination of Roma children in education.³⁰ There is no separate national structure to bring

²⁴ For recent examples, see: *Contribution of Hungarian CSOs to the European Commission's Rule of Law Report*, January 2023, https://helsinki.hu/en/wp-content/uploads/sites/2/2023/01/HUN_CS0_contribution_EC_RoL_Report_2023.pdf, pp. 58-59.

²⁵ European Commission, *2022 Rule of Law Report – Country Chapter on the rule of law situation in Hungary*, https://commission.europa.eu/system/files/2022-07/40_1_193993_coun_chap_hungary_en.pdf, p. 29.

²⁶ For a detailed analysis, see: Hungarian Helsinki Committee, *Non-Execution of Domestic and International Court Judgments in Hungary*, December 2021, https://helsinki.hu/en/wp-content/uploads/sites/2/2021/12/HHC_Non-Execution_of_Court_Judgments_2021.pdf, pp. 10-13. and 15-16. This also amounts to the non-implementation of a European Court of Human Rights judgment: https://helsinki.hu/en/wp-content/uploads/sites/2/2022/08/HCLU-HHC_Rule_9_Kenedi_072022.pdf.

²⁷ The list of the respective Constitutional Court decisions is available here: <https://www.parlament.hu/az-orszaggyules-donteseire-vonatkozo-alkotmanybirosagi-hatarozatok>.

²⁸ European Commission, *2023 Rule of Law Report – Country Chapter on the rule of law situation in Hungary*, https://commission.europa.eu/system/files/2023-07/40_1_52623_coun_chap_hungary_en.pdf, p. 1.

²⁹ Democracy Reporting International – European Implementation Network, *Justice Delayed and Justice Denied: Non-Implementation of European Courts Judgments and the Rule of Law*, 2023, <https://tinyurl.com/4wuwj3f>

³⁰ See, respectively: *Szabó and Vissy v. Hungary*, <http://hudoc.exec.coe.int/eng?i=004-10745>; *Baka v. Hungary*, <http://hudoc.exec.coe.int/eng?i=004-10859>; *Gazsó v. Hungary* group of cases, <http://hudoc.exec.coe.int/eng?i=004-10875>; *László Magyar v. Hungary* group of cases, <https://hudoc.exec.coe.int/eng?i=004-10897>; *Gubacsi v. Hungary* group of cases, <https://hudoc.exec.coe.int/eng?i=004-10515>; *Horváth and Kiss v. Hungary*, <http://hudoc.exec.coe.int/eng?i=004-10905>.

together various actors to coordinate the implementation of ECtHR judgments; meaningful parliamentary oversight is lacking.³¹

In the past few years, severe problems have emerged with regard to the execution of the judgments of the CJEU as well, amounting to non-compliance. A recent study shows that Hungary has not (or only partially) implemented 9 out of the 13 CJEU judgments issued in the field of asylum and migration.³² Non-execution of CJEU judgments in this area results for example that the criminalization of “facilitation and support of illegal immigration” continues to have a deterring effect on the provision of legal assistance to asylum-seekers,³³ and that push-backs of third-country nationals to Serbia continue *en masse*.³⁴

RECOMMENDATIONS

We call on the OSCE and OSCE Participating States to urge the Hungarian government to:

- Implement the recommendations of the EC’s 2023 Rule of Law Report without delay;
- Fully observe the requirements set out in “ODIHR Brief: Guiding Principles of Democratic Lawmaking and Better Laws”;
- Revise the legislative framework of the state of danger in line with international standards, in particular standards set by the Venice Commission, and curtail its excessive emergency regulatory powers;
- Show self-restraint in the use of the extremely wide-ranging authorization it received during the state of danger, and refrain from issuing emergency decrees that are not related to the war in Ukraine;
- Appropriately implement and adhere to existing domestic legislation providing for public participation and consultation in the legislative process;
- Introduce legislation to ensure that laws adopted in breach of the rules on public consultation cannot become/remain part of the legal system;
- Make use of the expert knowledge of ODIHR to devise a strategy to enhance impartial, open, and inclusive public consultation and dialogue;
- Ease restrictions on the right of Members of Parliament to propose legislation and close loopholes on public scrutiny and debate in parliamentary procedures;
- Restore the independence of the Constitutional Court, in particular by amending the nomination and election process for Constitutional Court justices;
- Fully comply with the super milestones and measures set in Hungary’s Recovery and Resilience Plan, under the horizontal enabling condition “effective application and implementation of the Charter of Fundamental Rights”, and under the conditionality mechanism;
- Take steps to ensure that state bodies execute domestic court judgments;
- Implement the judgments delivered by the ECtHR and the CJEU with regard to Hungary without delay.

³¹ For a detailed description of the issue, see: Hungarian Helsinki Committee, *Non-Execution of Domestic and International Court Judgments in Hungary*, December 2021, https://helsinki.hu/en/wp-content/uploads/sites/2/2021/12/HHC_Non-Execution_of_Court_Judgments_2021.pdf, pp. 50-54.

³² Hungarian Helsinki Committee, *Implementing judgments in the field of asylum and migration on odd days*, 2022, <https://helsinki.hu/en/wp-content/uploads/sites/2/2022/11/Implementing-judgments-in-the-field-of-asylum-and-migration-on-odd-days.pdf>, with special regard to pp. 42-43.

³³ In more detail, see: *Criminalisation continues – Hungary fails to implement CJEU judgment*, 21 December 2022, <https://helsinki.hu/en/wp-content/uploads/sites/2/2022/12/Criminalisation-continues.pdf>.

³⁴ In more detail, see e.g.: Amnesty International Hungary et al., *Assessment of compliance by Hungary with conditions to access European Union funds*, April 2023, https://helsinki.hu/en/wp-content/uploads/sites/2/2023/04/HU_EU_funds_assessment_Q1_2023.pdf, p. 54.