LET law RULE

A Hard-line Autocracy in the Making

The Hungarian constitutional system has changed significantly since 2010. Critical analyses speak of democratic decline. This short report summarizes the main events in the last three years. The changes made to the electoral system, emergency powers, freedom of expression, the right to privacy and equal treatment are causing severe damage to democracy, the rule of law, and fundamental rights. Hungary is drifting more and more openly in the direction of full autocracy and is less and less pretending to be a democracy.

Hungary can no longer be considered a full democracy – this is the conclusion of the European Parliament (EP) in 2022.

In its comprehensive resolution, the EP condemned the 'deliberate and systematic efforts of the Hungarian government' to undermine the fundamental values of the EU. The resolution was based on rapporteur Gwendoline Delbos-Corfield's report using even stronger language than the earlier report, given the increasing democratic deterioration since the previous report was written. The report criticized the decline in the constitutional system of checks and balances; flaws in Hungary's electoral system; attacks on the independence of the judiciary; corruption; lack of respect for data protection; violations of academic freedom, freedom of religion, freedom of association; and infringements of the right to equal treatment, including for LGBTIQ people, Roma, migrants, and asylum seekers.

The resolution concludes that in addition to the measures of the Hungarian government, the lack of decisive EU action has also contributed to the emergence of a 'hybrid regime of electoral autocracy', i.e., a constitutional system in which elections occur, but there is no respect for democratic norms and standards.

Electoral system

In 2022 the Hungarian Parliament changed the electoral rules five months before the election, after it was clear that all opposition parties had united to put up only one joint candidate against the Fidesz candidate in each district to overcome the bias in the rules. Under the new rules, any voter could suddenly register to vote in any district. This allowed the governing party (which had been collecting data on the political opinions of its citizens for years) to make its voters vote in nearby districts to enable the party to yet again win an overwhelming parliamentary majority.

After academics and opposition politicians came up with proposals on how to change the constitutional system after the elections in the unlikely event of an opposition victory, Chief Justice Tamás Sulyok, the president of the Hungarian Constitutional Court, warned about the alleged dangers of attacks on Hungary's constitution. In his open letter addressed to the president of the republic, the prime minister, and the speaker of the National Assembly, he claimed that these proposals amounted to a direct, massive, and utterly unacceptable attack on the constitutional system. He also requested the assistance of these authorities to take appropriate and effective measures against those opposition figures who had proposed constitutional changes in order to make the constitutional order conform with the principles of the rule of law. In short, the president of the Hungarian Constitutional Court attacked the political opposition and recommended measures against them for suggesting constitutional reform in their election manifesto.

In April 2022 the Fidesz party won the general election with 54 % of the votes and 85% of the districts. The disproportionate electoral system again gave the winning party a two-thirds majority in Parliament.

The election observation missions of the OSCE Office for Democratic Institutions and Human Rights concluded that the 2022 parliamentary elections were free but not entirely fair due to a combination of the following factors: undue advantage enjoyed by the governing party because of partisan changes in election law, restrictive campaign regulations that disadvantage the political opposition, biased media coverage that favors the governing party, absence of a level playing field due to a blurring of the line between a political party and the state, hostile and intimidating campaign rhetoric limiting the space for substantive debate and diminishing voters' ability to make an informed choice, and excessive government spending on public information advertisements that amplify the ruling coalition's campaign message.

The next elections to the European Parliament are due in 2024. The 11th Amendment to the Fundamental Law of Hungary (Constitution of Hungary), adopted in July 2022, affects the voting rights of Europeans who are not Hungarian citizens. Since local elections have sometimes resulted in victories for opposition candidates, the 11th Amendment changes the framework for these elections. From now on, local elections will be held on the same day as European elections. This modification limits the input of European citizens who are resident in Hungary and therefore have the right to vote in local elections under European law. Instead of voting once every four years in local elections, they will now only be permitted to vote once every five years.

In December 2022 the European Court of Human Rights ruled that the system of minority

representation violated the rights of minority group members to vote and not to be discriminated against. The ECHR found that the votes of ethnic minorities were diluted in this process because their votes were lost when the relevant threshold was not met. The ECHR also found that the closed lists unduly limited their choices because they had no say in determining the candidates that appeared on these lists. In addition, the rules violated the secrecy of the ballot because minority voters had to register ahead of time and would only have one choice when they came to vote.

In the most recent national consultations, the Hungarian government asked the population about lifting COVID-19 restrictions (2021) and joining European sanctions on Russian energy (2023). The government described the sanctions against Russia after its illegal invasion of Ukraine as 'Brussels sanctions'. The questionnaire indicated that the right answer was to oppose them, even though the Hungarian government had voted for all of the sanction packages that the EU had coordinated to that date.

To conclude, while Hungary retains both multiparty elections and some forms of direct democracy, the electoral framework is structurally designed and carefully managed to deny opposition candidates a fair possibility of winning and to deny anybody but the government the ability to consult the electorate about policy matters. Legal norms and practices concerning elections and referenda ensure the dominance of the governing party. Using national consultations instead of popular initiatives and referendums also ensures that the government can control the process and outcome of the vote.

Emergency powers

In recent years, normal law-making has been abandoned in favor of the executive holding nearly unlimited power and ruling by decrees.

Since the beginning of the global pandemic in March 2020, Hungary has been in a state of medical emergency that was first announced in a decree by the prime minister and then confirmed by Parliament, which delegated extraordinary powers to the prime minister to continue to govern by decree. It was then confirmed again when Parliament passed a more comprehensive Enabling Act creating a legal framework for the prime minister to continue exercising unlimited power with the possibility of infinite renewals. In the end, Parliament amended the Fundamental Law of Hungary (Constitution of Hungary) to permit the prime minister to govern indefinitely by decrees that may override any law without requiring further permissions from Parliament.

Once the Ukraine war began in 2022, the Hungarian Parliament proclaimed a new state of

emergency due to a war in a neighboring country, which also allows for the prime minister's power to override any law by decree. Most of the decrees issued during the pandemic emergency were then transferred to this new legal framework allowing them to remain in force. Nearly three years into a continuous state of medical emergency, drafting executive decrees without consultation outside the cabinet and implementing them immediately has become Hungary's primary way of making laws.

Emergency powers overriding ordinary legislative procedures to allow the prime minister to govern by decree have already been used before 2020. The 'state of medical emergency' that began in 2020 was added to the 'migration emergency' declared in 2015, which is still in force in 2023, even though the situation causing the migration emergency has long since changed. During the migration emergency, the powers given to the prime minister were limited to certain areas, but within the scope or their remit, the prime minister's powers were absolute. The 2020 emergency however gave the prime minister absolute power to overrule the law by decree in any area, not just in those relevant to a health emergency. The prime minister has used these powers in many different ways, from replacing the board members of a publicly traded company with his own loyalists to redirecting the tax revenue from a municipality, governed by the political opposition, to the county level controlled by his party's majority. As a result, the ordinary legislative process in Hungary has been effectively suspended during these extended emergencies.

In late 2022 the prime minister empowered himself to amend the duly enacted budget – which the Fundamental Law of Hungary (Constitution of Hungary) requires to be passed by Parliament – in any way he sees fit. The prime minister has since used this power to completely rewrite the 2023 budget, presenting it to Parliament as a fait accompli after the start of the fiscal year. A country in a permanent state of emergency with laws that can be changed by decree at short notice is not governed by the rule of law.

Freedom of expression and right to privacy

In 2021 the Constitutional Court ruled against free speech, protecting the sensibilities of a religious person. In 2016, when Poland tightened its abortion laws, Hungarian demonstrators protested against this decision in front of the Polish embassy in Budapest. They staged a performance imitating the Eucharist, and one protester placed a white tablet from a bag labelled 'abortion pills' on the other protesters' tongues. A few Catholics who saw this performance on YouTube lodged a complaint with the Constitutional Court. In its decision, the Constitutional Court maintained that the performance violated the Catholic petitioners' human dignity because their religious community was disproportionately offended.

Journalists investigating Hungary's relationships with Russia and China had their cell phones infiltrated with Pegasus software that permitted the government to spy on them in the most intrusive ways. The Hungarian government's ability to infiltrate electronic devices without the knowledge of the owner of those devices improved considerably when the Hungarian government started using a powerful advanced spyware called Pegasus, manufactured by an Israeli cybersecurity firm, the NSO Group. Pegasus has since been used to keep investigative journalists, publishers, attorneys, and opposition politicians under surveillance – as reported in 2021 by a team of international journalists, including a domestic media outlet (Direkt36). The government did not deny that it had used Pegasus, but it did not immediately admit to the surveillance of the people Direkt36 had mentioned. It declared instead that the national security services had not engaged in 'illegal surveillance'. In November 2021 the governing party admitted that the Ministry of Interior had purchased Pegasus and that its use had been sanctioned in every case by the Ministry of Justice, admitting to what had already been proven by independent authorities. Investigative reports revealed later how the Pegasus software had been bought for Hungary by a broker to cover the government's tracks.

In its report, the National Authority for Data Protection and Freedom of Information found that the use of Pegasus spy software was legal. The authority approved of the government's actions in every detail and went even further by suggesting that the person responsible for leaking the use of Pegasus to the press should be prosecuted.

Pegasus is not the only technology used to spy on Hungarians. A law requires Hungarian communication service providers to install access points in their networks, so that the government does not need to request access through the service provider itself to intercept communications traffic directly. The access points permit substantial amounts of all phone and internet traffic across the network to be captured in real time without the intervention of the internet service provider. Given the provisions in the law specifying how much traffic the Hungarian government would be permitted to intercept at any one time, this could amount to the surveillance of thousands of individuals at any given moment. But the law has little to say about when and why the Hungarian authorities should be allowed to use these powers; the law authorizes the interception of vast amounts of communications traffic without defining limiting conditions. Before this new law was passed, Hungarian law already required communication companies to provide access to their networks when asked; the additional law now allows the Hungarian government to access the networks without alerting the carriers. Therefore, even the communications service providers may not know how much surveillance is being carried out over their networks.

In its judgement of Hüttl v. Hungary, the ECHR in 2022 repeated the criticism of Hungary's

unlimited surveillance system. The case involved a lawyer for an NGO whose phone had been tapped. The government denied the surveillance; the applicant provided evidence that his calls had been recorded.

Regarding freedom of expression in an academic context and academic freedom, Hungary was identified as the worst EU country according to the V-DEM Academic Freedom Index and the only EU Member State (out of all those measured) in their 'B category' in 2022. In the same year, the European Council decided that Hungarian universities that already went through the 'model change' and were run by the so-called 'public interest trusts' were excluded from direct EU tenders, including Horizon Europe and Erasmus, under the EU's conditionality regulation. Existing Horizon Europe and Erasmus agreements were not affected by this decision, but potential future ones were suspended as of December 15, 2022.

Equal treatment

The Equal Treatment Authority was abolished by the governing majority in 2021. This authority had been set up in 2003 to implement the directives on equal treatment in the EU. Before its abolition, the authority had been viewed by vulnerable social groups as one of the few remaining independent public bodies that delivered decisions condemning discrimination based on sex, ethnicity, religion, disability, age, sexual orientation, and gender identity. From January 1, 2021 the office of the ombudsperson has assumed its tasks and is currently responsible for monitoring discrimination. However, this body is not independent of the government. According to the 2022 Rule of Law Report, the UN Sub-Committee on Accreditation of the Global Alliance of NHRIs confirmed its earlier recommendation to downgrade the Hungarian office of the ombudsperson to B-status. As a result of the merger, the new system of protection against discrimination is generally more complicated, with the number of discrimination complaints having decreased significantly.

New legislation has severely affected the basic rights of LGBTIQ+ people. Since 2020 the Fundamental Law of Hungary (Constitution of Hungary) has explicitly stated that 'the father is a man, and the mother is a woman'. In 2021 an Act was adopted to ban 'homosexual propaganda to minors', i.e., media content related to the 'portrayal and promotion of homosexuality' and limiting gender-affirming health care to minors in order to protect 'the child's identity, which is immutable from birth'. As a result, no other family model may be presented in books and school education in order to ensure that the students do not have any queer role models. Meanwhile, the number of hate incidents has increased in the last few years, making life in Hungary less safe for LGBTIQ+ minorities.

In 2020 the Court of Justice of the EU (ECJ) found that Hungary had breached EU asylum law by setting up detention camps, the so-called transit zones, for asylum seekers arriving from Serbia and drastically limiting the daily number of applicants authorized to enter those transit zones, and by introducing the so-called push-back practice, i.e., the removal of foreign citizens staying illegally in Hungary without the safeguards laid down in the EU Directive. As a reaction, the Hungarian Minister of Justice requested an interpretation of the Hungarian constitution from the Hungarian Constitutional Court. In her application, the minister claimed that the judgment of the ECJ constituted an open violation of the Hungarian constitution.

In its judgment issued in 2021, the HCC did not declare the ECJ ruling unconstitutional. The HCC stated that the review of an ECJ judgment cannot be the subject of a constitutional interpretation. At the same time, the judgment denied the principle of the primacy of European Union law. According to the judgment, EU law must not restrict Hungary's inalienable right to dispose of its territorial unity, population, form of government and organization of the state. If EU law is deficient, Hungary, in the name of sovereignty and the right to self-identity, is entitled to exercise constitutional powers and take the necessary measures. The reasoning insists on the Hungarian nation's fundamental right not to tolerate that a foreign national stays illegally in Hungary for an indefinite period of time and thus become part of the population.

In 2023 the ECHR condemned Hungary's inhumane refugee policy several times. The ECHR ruled against the Hungarian state for unlawfully and arbitrarily detaining asylum seekers. Hungarian authorities have illegally detained children for months (M.M. v. Hungary) and denied basic healthcare to detained asylum seekers (H.N. v. Hungary). A 14-year-old boy crossed the Serbian-Hungarian border without his parents and relatives; the border guard assaulted and humiliated him and violently forced him back to Serbia. Doctors Without Borders documented the injuries on the boy's head due to the abuse (R.N. v. Hungary). Hungarian authorities are also responsible for the death of a young Syrian man. The man was trying to cross the river from Serbia into Hungary with his family. When they reached the riverbank, police officers set dogs on them, shot tear gas, and threw stones at them. The man drowned and died in the river Tisza at the Serbian-Hungarian border after the actions of the police (Alhowais v. Hungary).

Police violence is increasing in other areas, too. There were several protests, rallies and strikes demanding better working conditions and higher salaries for teachers and criticizing a new law that would significantly increase the teachers' workload. At these events the police have been increasingly using tear gas and coercive measures, and have been detaining students and activists.

Consequently, the country is drifting more and more openly in the direction of full autocracy. On the one hand, regular elections are held, laws are adopted in a multiparty parliament, and constitutional institutions exerting some control remain in place. On the other hand, however, blatant prohibitions, and censorship have become daily occurrences, and political leaders often opt for even more blatant approaches, prohibitions, or suppressions. The changes made to the electoral system, emergency powers, freedom of expression, the right to privacy and equal treatment are causing severe damage to democracy, the rule of law, and fundamental rights.

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