Restoring the Rule of Law By Breaching It

Hungary's Judicial Reform and the Principle of Legality

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The judicial reform recently passed by the Hungarian Parliament ostensibly seeks to restore the independence of the judiciary and the rule of law in Hungary. Crucially, it is also a vital step for the government to gain access to the 27 billion in frozen EU funds. At first glance, it seems that the EU's strategy of withdrawing Hungary's access to EU funds unless it took steps to restore its rule of law might have worked. Yet, a closer look shows that while the reform has the potential of improving judicial independence, the procedure leading to its adoption shows that there is no real commitment to restore the rule of law more broadly. In particular, throughout the law-making process the government consistently flouted the principle of legality, including the requirement of transparent, accountable, democratic and pluralistic law-making.

Law-Making Processes as a Feature of Hungary's Rule of Law Backsliding

A core element of the European Commission's rule of law concept is that "all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights". This principle of legality requires the laws themselves to meet certain procedural and substantive requirements that make them suitable for protecting the said values and providing a meaningful safeguard against arbitrary and abusive acts of public powers. A central element of the Commission's understanding of this principle of legality is a requirement that law-making processes are transparent, accountable, democratic, and pluralistic. The OSCE Office for Democratic Institutions and Human Rights has also emphasised that "democratic law-making ensures that the process of making laws is open, inclusive and consultative and the resulting laws are human rights compliant". The transparency and inclusiveness of law-making also appear in other conceptualisations of the rule of law, such as that of the Venice Commission, which stated that "a consensus can now be found for the necessary elements of the rule of law as well as those of the Rechtsstaat which are not only formal but also substantial or material [...]. These are: (1) Legality, including a transparent, accountable and democratic process for enacting law [...]."

During Hungary's decade-long rule of law backsliding, the Fidesz party majority regularly breached this principle, thereby aggressively reshaping the legislative framework. In particular, it has for years neglected the statutory obligation to conduct public and professional consultation on draft laws prepared by ministries. Crucial bills have been submitted to Parliament without any prior consultation with those affected and then passed with limited parliamentary debate. Professional and civil society organisations and the general public have been completely excluded from the law-making process, even though their inclusion is mandatory. Thus, Act CXXXI of 2010 on Public Participation in Preparing Laws renders public consultation obligatory for laws prepared by Ministers and demands the online publication of draft laws to allow public comments.

Not surprisingly, shortcomings in the law-making process were pointed out repeatedly by the EU, including in the European Parliament Resolution initiating the Article 7 procedure against Hungary, the European Commission's Rule of Law Reports as well as the country-specific recommendations formulated within the European Semester. Moreover, when the European Commission and the European Council finally conditioned Hungary's access to EU funds on its adherence to certain, common values of the European Union, they

set the improvement of the law-making process as one such condition.

In particular, one of the Commission's supermilestones requires Hungary to use public consultations and impact assessments in the process of adopting legal norms. Nonetheless, in July 2022, the Hungarian government tabled the very bill ostensibly designed to strengthen public consultation without the legislatively prescribed public or professional consultation, demonstrating how unserious the Government's commitment to strengthening public participation is. At the same time, Hungarian NGOs have pointed out that the adopted bill does not meaningfully improve the law-making process, with several factors in fact undermining its capacity to ensure effective public consultation. Thus, the law contains a wide range of exceptions allowing draft laws to be adopted without public consultation. Furthermore, the eight-day minimum consultation period prescribed by the law is insufficient for meaningful consultations in the case of voluminous bills. The transparency of the process is also not adequately ensured (for instance, the opinions submitted in the framework of the consultation process are not published by the Government in their entirety), and the quality of impact assessments is also often inadequate.

Double Insured, Still Breached

Given the Hungarian government's track record, it is no surprise that the Council of the EU expressly required meaningful public consultation regarding bills seeking to implement the super milestones. In particular, it prescribed a 15-day open comment period for the bill on the judiciary. Nevertheless, the Hungarian Government chose to submit the bill on the judicial reform to the Parliament without allowing for public consultation and in breach of parliamentary Rules of Procedure. Indeed, the reform's adoption process consistently flouted the requirements of the principle of legality.

The reform was adopted in just three working days and under the name of another act. The bill that became the judicial reform was originally submitted on 3 March 2023 as the Bill on the Rules of Asset Declarations. It originally proposed the modification of several laws with respect to the rules on asset declarations, and neither its title nor its content was related to the judicial reform. However, it also included minor and unnecessary amendments to certain provisions of all the laws that were eventually amended in the context of the judicial reform. The Bill on Rules of Asset Declarations was discussed in a general debate, an in-depth debate, and by the Justice Committee of the Parliament. All discussions were conducted on the basis of the original text of the bill, which, it bears repeating, did not contain any provisions on the judicial reform. By 14 March 2023, all discussions had been closed, and the bill was scheduled for adoption on 3 May 2023.

However, three working days before the scheduled adoption, the Bill on the Rules of Asset Declarations was suddenly transformed into the judicial package implementing the super milestones. On 27 April 2023, at the request of the Deputy Prime Minister, proceedings of Parliament's Legislative Committee were opened, and ruling party MPs submitted the whole judicial reform as their own amendment to the Bill on the Rules of Asset Declarations (even though the original judicial reform bill was drafted by the Ministry of Justice, not individual ruling party MPs).

The amendment's text only became available on the Parliament's website at 16:36 on 27 April 2023, just one working day before the plenary discussion of the bill on 2 May 2023. Absurdly, the Reform still went through the rest of the legislative process under the name 'Bill on the Rules of Asset Declarations,' while its content no longer affected asset declarations in any way. This way, the text of the judicial reform was adopted without time for proper parliamentary debate regarding its content.

Business as Usual

This bait-and-switch has been used by the ruling majority on several occasions, even in cases of important judicial reforms, with the deliberate aim of circumventing meaningful public debate on legislation. Yet this time, the Hungarian government took this abusive practice further, breaching the Parliament's Rules of Procedure on two separate legal bases.

On the one hand, Section 40(3) of Parliamentary Decision 10/2014 (II.24.) on the Rules of Procedure clearly states that "an amendment proposal that seeks to delete the entire bill shall not be discussed and shall not be put to a vote." In this case, the original Bill on the Rules of Asset Declarations was fully deleted and replaced with entirely new content. Not even a small part of the original text remained. On the other hand, the modification also breached Section 42(b) of the Rules of Procedure, according to which a proposed amendment may not alter the scope of the original bill. This was precisely the case here, as the original bill dealing with asset declarations only covered a few irrelevant parts of the laws relating to the judiciary.

To Breach or Not to Breach

Although the Hungarian government published a proposed judicial reform in January 2023 for consultation, the one it ultimately submitted to Parliament is remarkably different from the one it allowed consultation upon. As three Hungarian NGOs have pointed out in their joint analysis of the judicial reform package, some of these differences can be regarded as positive e.g. the extension of the statutory eligibility criteria for candidates for the position of the high court's President to include "independence, impartiality, integrity, and probity"). Yet others are highly concerning, such as the codification of the composition of "uniformity decision chambers" (i.e. judicial panels authorised to resolve collisions between different decisions of the high court). This fails to provide sufficient guarantees against manipulation by the high court President, who is a political appointee elected by two third of the MPs. Given that the consulted text differs greatly from the text ultimately voted upon by the Legislative Committee, the adopted reform package contains large segments that were not consulted on or discussed with the public or professional stakeholders – including the National Judicial Council – as required by the milestones.

It would be a dramatic setback for the Hungarian government if the content of the judicial reform were greenlit only for these procedural problems to prevent it from accessing the frozen funds. To avoid this consequence, the Hungarian government has endeavoured to prove its compliance, suggesting that the normal law-making procedure was followed. In particular, because the judicial reform was tabled by individual ruling party MPs and not the Ministry of Justice, Hungarian law did not require the publication of the results of the consultation procedure regarding the January proposal. Thus, Act CXXXI of 2010 only requires the publication of the results if and once a bill is actually submitted to Parliament. The results of the public consultation regarding the unsubmitted January draft were nevertheless shared with the public to give the appearance of a connection between the first proposal drafted by the Ministry of Justice and the adopted reform submitted by ruling party MPs.

Restoration Without Breach

At the same time it took a crucial step towards restoring the rule of law by strengthening judicial independence, the Hungarian government nonetheless chose to breach it in a different way, by deliberately undermining a transparent, accountable, democratic, and pluralistic law-making process. As three Hungarian civil society organisations warned, the shortcomings of the legislative process *"signal that the Hungarian government's willingness to comply with the conditions for union funds is not paired with a true commitment to restoring the rule of law."*

The deficiencies of the law-making process should be carefully evaluated by the European Commission, which should pay attention to the role of abusive legislation in dismantling the rule of law in Hungary. If the European Commission releases funds unconditionally based on the adopted laws, it will legitimise long-standing practices that consciously aim to circumvent the public consultation process, the parliamentary debate of the laws, and the Parliament's Rules of Procedure. The European Commission's response must make the Hungarian government understand that breaching the rule of law is not the right way to restore the rule of law.

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