Budapest, 31 October 2020

Council of Europe
DGI – Directorate General of Human Rights and Rule of Law
Department for the Execution of Judgments of the ECHR

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Subject: NGO communication with regard to the execution of the judgments of the European Court of Human Rights in the *Patyi and Others v. Hungary* case group

Dear Madams and Sirs,

In August 2020 the **Hungarian Civil Liberties Union** ("HCLU") and the **Hungarian Helsinki Committee** ("HHC") submitted joint observations and recommendations under Rule 9(2) of the "Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements" regarding the execution of the judgments delivered by the European Court of Human Rights (the "Court" or "ECtHR") in the ***Patyi and Others* case group**.

The Hungarian Government commented on the submission on 9 September 2020[1] (Government's Reply) attempting to refute some of our statements and conclusions. In order to provide the Committee of Ministers with a clearer picture on the debated points regarding the legislation and practice of the freedom of assembly in Hungary, the HCLU and the HHC find it necessary to reflect briefly to the main points of the Government's Reply, add some further remarks and draw attention to new developments concerning the case group.

NEW ECTHR JUDGMENT RELATED TO THE GROUP

1. Within the few weeks that have lapsed since the submission of the Government's Reply, **the ECtHR delivered a new judgment related to the case group**. The *Póka v. Hungary* case (Application no. 31573/14, Judgment of 6 October 2020) concerned a banned demonstration scheduled to be held at two locations, one of them being **the neighbourhood of the Prime Minister's residence**. The assembly notification was dismissed with reference to the fact that **the Anti-Terror Centre closed down the area for security reasons**. The ECtHR found that the Hungarian court had unlawfully expanded the grounds for banning a demonstration, therefore the interference was devoid of a basis in domestic law and established violation of Article 11 of the Convention.

2. The *Póka v. Hungary* judgment is just one further case proving our claim that preventing demonstrations at the private residence of high-ranking politicians and the *de facto* ban or dissolution of an assembly on the basis of a security measure is **a long-standing practice and part of a wider pattern in Hungary**. For the execution procedure to be closed, the Government would have to prove that sufficiently effective legal guarantees against further similar violations and repetitive breaches of the right to peaceful assembly have been introduced. We maintain that the Government has failed to comply with this obligation.

[1] https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016809f8d62

DEMONSTRATIONS AT THE PRIVATE RESIDENCE OF HIGH-RANKING POLITICIANS

3. In our submission we demonstrated how the decade-long prohibitive practice of the police, the relevant jurisprudence of ordinary courts and the Constitutional Court, and the most recent legislation **created a chilling effect on citizens**. We highlighted that since the entry into force of the New Assembly Act in 2018, **the type of demonstrations assessed in the *Patyi and Others* judgment have simply disappeared from the toolbox of citizens** wishing to express their dissent with actions of high-ranking politicians.

4. **The Government does not deny that the Fundamental Law was supplemented in order to create a new constitutional basis for restricting assemblies and the Assembly Act created new grounds to restrict assemblies scheduled in the neighbourhood of politicians**.

5. While trying to counter our arguments on the chilling effect, the Government practically confirmed it, stating that *"no case is known since the entry into force of the new Assembly Act in which the court has prohibited a demonstration planned to be held in front of politician's house."* The Government simply fails to mention that this is not the consequence of a permissive turn in the practice, but **the result of the new legislation's chilling effect**, due to which no such demonstrations are organised any more. We also remind that in connection with the New Assembly Act, the Head of the Prime Minister's Office, Gergely Gulyás expressly declared that *"the aim of the amendment is to prevent demonstrations in front of private residence of politicians"* and that ***"the era of demonstrations in front of private residences shall be terminated."***[2]

6. We also referred to the fact that **the police dissolved an assembly immediately after the entry into force of the New Assembly Act**. When assessing the chilling effect of the new legislation, it is rather relevant that the demonstration was not dissolved but the activists were – as claimed by the Government – merely *"asked by the police to leave the area situated in front of the Prime Minister's house by stating that under the rules of the New Act, in the future no demonstrations were to be held there."* Although the measure of the police might not formally qualify as dissolution of an assembly, but *de facto* it obviously still had the same effect.

DEMONSTRATIONS AT THE PARLIAMENT AND GOVERNMENTAL OFFICES

7. According to the Government *"the New Assembly Act does not prescribe sui generis rules imposing stricter limitations to demonstrations held in front of the Parliament building."* In our submission, we exactly stated and identified as a problem that **holding assemblies at the Parliament and governmental offices can be banned, restricted or dissolved for reasons *falling outside* the New Assembly Act**. The mere fact that the New Assembly Act itself does not contain specific restrictions regarding the Parliament does not preclude authorities from *de facto* restricting such assemblies (e.g. via security measures). Precisely this is the reason why the ECtHR found in the cases of *Patyi (No. 2) v. Hungary*, *Szerdahelyi v. Hungary*, *Tóth v. Hungary* and most recently the *Póka v. Hungary* that the **bans had no legal basis and were therefore not prescribed by law**. The fact that the possibility of restrictions is not codified in the New Assembly Act enables the authorities to apply bans outside the scope of the New Assembly Act.

8. The Government claims that *"due to the new regulation of cases invoked in the submission, dating from before 1 October, 2018, have no relevance"*. This could be a strong argument if the Government could prove that the new legislation provides effective protection against similar violations in the future. Nevertheless, the Government has not in any way clarified how the new legislation is designed to prevent the **unjustified application of security measures**. In fact, the New Assembly Act does not address this issue at all and has not introduced a procedure whereby a timely judicial

[2] https://merce.hu/2018/05/25/hamarosan-korlatozhatjak-a-politikusok-hazai-elotti-tunteteseket/

review of both the security measure and the ban based on it could be requested by the organisers. Therefore, the police **may still at any time declare any given public space unavailable for holding demonstrations.**

9. Our submission provided an example of a demonstration in front of the Parliament where the police took note of the assembly, but later ordered to close down the notified location of the demonstration. **The Government does not deny that the security measure restricted a notified assembly scheduled at the Parliament,** only argues that the Kossuth square was closed for the smallest possible area and for the shortest possible time to ensure the security of Marek Kuchcinski. However, the extent of the restriction is of limited relevance as our point is that **organisers and participants do not have a truly effective legal remedy against arbitrary application of security measures.** The Government's Reply practically confirms our view as it fails to explain how the freedom of peaceful assembly is protected against last minute security measures ordered *after* the police took note of the demonstration and what action the organisers could have taken to effectively challenge the restriction of their right to assembly through such a security measure.

10. The Government also argues that the possibility of timely judicial remedy is ensured in cases where *"the assembly authority happens to base its decision on a security measure protecting persons and facilities"* and refers to a procedural rule[3] that has – to our knowledge – never been applied in practice. The reasons for non-application of the provision in assembly cases are most probably the following:

(i) While an assembly must be notified at least 48 hours before the planned time of the demonstration, the police is not subject to any time limit in ordering a security measure, therefore it is more usual that the police (the Anti-Terror Centre or the Parliamentary Guards[4] respectively) applies the security measure *after* the assembly authority takes note of the assembly.

(ii) If the regulatory authority takes note of the assembly, there is no ban that could be challenged before the court. If afterwards the police orders a security measure and on that basis prevents the participants from entering the planned scene of the demonstration, then the assembly cannot even start, so no dissolution will take place, and therefore, the judicial remedy against unlawful dissolutions will again be unavailable for the organisers. Therefore, depending on the timing, the police can fully subtract such a restriction from under the remedial scope of the New Assembly Act.

(iii) The procedural rule shall only be applicable, if the security measure order (the measure of general effect) serves as basis of a restrictive or banning resolution (the measure of individual effect) of the assembly authority. However, this situation can hardly take place, as the assembly authority does not need to rely on a security measure in order to restrict the right to peaceful assembly. If an assembly is scheduled on a venue closed down by a security measure, the police can simply rely on the New Assembly Act. The grounds of restrictions in the New Assembly Act are wide enough to serve as a basis of restriction on their own (e.g. Section 13 (3) of the New Assembly Act stipulates that public order is also at risk if the notification or the assembly hinders the performance of an obligation undertaken regarding a person residing in Hungary and enjoying diplomatic or other immunity based on international law).

11. For the above reasons, we do not agree with the Government and maintain that in fact no effective remedy against arbitrary limitations of assemblies based on security measures is available in the Hungarian legal system with the required certainty.

[3] The Government refers to Section 4 (5) of the Act I of 2017 on Administrative Court Procedure.
[4] Parliamentary Guards are also vested with the right to apply security measures based on Section 133 (2) of Act XXXVI of 2012 on the National Assembly.

TRAFFIC-RELATED BANS

12. Our submission demonstrated that the legislation and the practice of the regulatory authorities have also moved into a more restrictive direction, where the free flow of traffic is given a higher degree of precedence over the freedom of assembly than it was the case under the Old Assembly Act. Instead of arguing our statement, the Government provided further arguments regarding why traffic-bans shall be judged in a stricter manner.

13. Arguing the non-reduction of the earlier level of protection by ordinary courts, the Government refers to an administrative ruling of principle relevance delivered under the New Assembly Act [principle ruling no. 4/2020]. Nevertheless, the Government fails to mention that rulings of principle relevance were set aside by a recent modification of the law, and they cannot be accorded any particular weight any more. The newly established tools of unification of the jurisprudence are concentrated in the hands of the Curia (the highest court of Hungary) and especially in the hands of the President of the Curia via the introduction of a limited precedent system and new procedures on the unification of the case-law.

THE FORM OF NOTIFICATION

14. Misinterpreting our submission, the Government claims that notification can be made in person or in paper, using the traditional means of notification. We never claimed otherwise, merely called attention to the fact that **the new legislation poses a strict condition to electronic means of notification recognising only one single official electronic channel for the notification.** Under the old Assembly Act, the police accepted the notification via email. Since the New Assembly Act entered into force, the police only accept electronic notifications via the official electronic channel established by state authorities. While an email with the required information on the planned assembly could be sent even from a smartphone, the application of the official electronic channel **requires electronic registration into an official state provided account (and the registration process can be completed only in person), substantial IT-skills and PC-optimized applications from organisers.** The fact that email-notification is not accepted, registration for using the official electronic communication channel is still required, and the failing to fulfil the notification requirements is sanctioned with a fine can constitute significant administrative barriers. This is especially problematic for organisers of urgent assemblies, as they are obliged to notify the police even when they have very limited time to do so, therefore, in their case the personal or postal submission of the notification is not a viable option most of the time.

RELEVANCE OF THE SHIFT IN EXCLUSIVE JUDICIAL COMPETENCE

15. The Action Report lodged by the Government[5] entirely relies on the jurisprudence of the Budapest-Capital Regional Court, the formerly competent judicial forum. Our submission pointed out that as of 1 April 2020, another court (the Curia) was designated to exclusively deal with assembly cases and we raised concerns regarding this modification. **The Government's Reply practically confirmed our statement and reinforced our concerns in all respects.**

(i) We claimed that there has been **a shift in the exclusive competence that the Government overlooked in the Action Report**. The Government's Reply now provided a detailed explanation of the amendment, affirming the replacement of the exclusively designated court.[6]

(ii) We pointed out that the Action Report was drafted based on judgments delivered by the court that lost its competence and stated that **replacing the exclusively designated court may**

[5] The Action Report no. DH-DD(2020)395 was lodged by the Government on 29 April 2020.
[6] Complete section 1 of the Government's Reply.

lead to significant changes in the case-law described. The Government's Reply strengthens this position by explaining that the Curia was vested with exclusive competence in order to *"ensure uniform application of the law"* and eliminate contradictory jurisprudence. In light of this explanation we uphold our concerns emphasizing that **any unification of the prevailing jurisprudence entails the possibility of reshaping the current judicial interpretation of the law**.

(iii) We highlighted that **the judgments referred to in the Action Report cannot be deemed as consolidated jurisprudence because the Curia may deviate from the current case-law**. The Government's Reply fully affirmed our concern claiming that *"in no legal system in the world does the lower court's practice bind the higher-instance judicial forum"*.[7] In light of the above, we find it necessary to uphold our stance regarding **changes expected in the adjudication of assembly cases**.

(iv) We claimed that **the impact on the direction of the jurisprudence and the scope of protection to the freedom of assembly cannot be properly assessed at this time**. Responding to our argumentation, the Government claimed that the Curia has ruled "*only in five cases since the changes in the competence rules, from which number no conclusions about a trend can be inferred."* Agreeing with the Government, we maintain that **further monitoring is needed in order to assess the relevance of the modification and therefore the examination of this group of cases should not be closed at this time**.

(v) We also claimed that **channelling assembly cases to the Curia may also entail a wider risk of political interference in the adjudication of bans and restrictions**. We referred to a new legislation that introduced special rules for judicial appointments to the Curia for members of the Constitutional Court, an institution that has previously been packed with loyalists to the governing majority.[8] Although the Government intends to trivialise the issue,[9] our general concerns have already been confirmed within the relatively short period lapsed since the submission of our observations.

a. On 30 September 2020 the European Commission's 2020 Rule of Law Report's Hungarian chapter specifically dealt with the new rules on judicial appointments of Constitutional Court judges to the Curia, and came to the conclusion that *"[t]hese legislative changes have **de facto increased the role of Parliament in judicial appointments to the [Curia]**."*[10]

b. On 19 October 2020, the Parliament elected András Zsolt Varga as **future president of the Curia applying the impugned legislation**. The future chief-judge is a member of the Constitutional Court at the half of his term, a former prosecutor with not a single day of judicial service, freshly appointed as judge under the new legislation, outside the general application procedure of judges. On 8 October 2020, the National Judicial Council – the representative self-governing body of the Hungarian judiciary – rejected his nomination, claiming that it *"does not respond the constitutional requirement according to which the*

[7] The Government intended to put forward an argument that provides a reason for the possibility to change the current case-law. Although this argument of the Government practically affirmed our concerns, we must note that it is misleading for several reasons. First, as explained by the Government, assembly actions are single-instance procedures, therefore the court having exclusive competence always acts as last instance judicial forum, irrespective of its ranking within the judicial system. In assembly cases therefore, the Curia cannot be deemed as a higher-instance court than the Budapest-Capital Regional Court, but rather as a court delivering judgments on the same instance. Second, assembly proceedings aim to guarantee the exercise of a fundamental right. The level of protection of the fundamental right shall not change with the change of the level of the judicial forum deciding the case.

[8] Eötvös Károly Institute – Hungarian Civil Liberties Union – Hungarian Helsinki Committee, Analysis of the performance of Hungary's "one-party elected" Constitutional Court judges between 2011 and 2014, 2015, http://helsinki.hu/wp-content/uploads/EKINT-HCLU-HHC_Analysing_CC_judges_performances_2015.pdf

[9] See section 3 of the Government's Reply.

[10] European Commission, 2020 Rule of Law Report, Country Chapter on the rule of law situation in Hungary https://ec.europa.eu/info/sites/info/files/hu_rol_country_chapter.pdf

person sitting at the top of the court system shall be independent from other branches and shall appear as impartial for an external observer as well."[11] Although the objection within the judiciary was clear, the opinion of the National Judicial Council was completely disregarded by the ruling majority, which elected Mr Varga as president of the Curia.

c. The election of a Constitutional Judge at the mid of his term as new president of the Curia in itself reveals the falseness of the Government's argumentation, according to which *"taking into account the mandates and ages of the present Constitutional Court judges, until 2032 simultaneously maximum 4 former Constitutional Court judges can be appointed"* to the Curia. **The Government completely disregards the fact that Constitutional Court judges may also resign before completing their mandate**, just like Mr Varga did in order to become president of Hungary's highest court. All 15 current members of the Constitutional Court would be appointed by the governing majority and all of them may automatically become judges of the Curia upon their own request, also when they resign.

16. In any case, the main point of our submission was that it is premature to close down the examination of the group of cases based on jurisprudence that may significantly change in the future due to the designation of a different court to exclusively hear assembly cases. We maintain this stance and claim that it needs to be seen how the jurisprudence of the Curia develops before a well-grounded decision could be made on whether the monitoring of the execution of the ECtHR judgments can be reassuringly closed.

OTHER ISSUES

17. The Government claims that "*Section 222 of the Criminal Code does not order to punish the holding of an assembly in front of a politician's house*". This is technically true, however, the explanatory memorandum attached to the amending legislation that rendered punishable *"acts of harassment […] against a public official, at a place and time that is incompatible with his/her official duties"* explicitly states that this modification was made necessary by the 7th Amendment of the Fundamental Law. This is the amendment that introduced the possibility of restricting the freedom of assembly in order to protect the private life of others. The explanatory memorandum claims that the subsequent amendment of the Criminal Code was motivated by the wish to protect "*the officials' right to relax in an undisturbed manner after having performed their official duties, e.g. in their homes or when they are on a holiday and their right not to be harassed because of the activities they performed in an official capacity*".

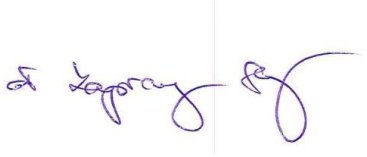
18. We do not question that if an assembly is duly notified and acknowledged by the police, then the organisers and participants are highly unlikely to face prosecution on the basis of this provision. However, the question is far less clear cut in the case of a spontaneous or urgent assembly in the proximity of a state official's residence, as in that case, the assembly is not and cannot acquire the preliminary approval of the authorities.

19. The pre-2018 police practice and jurisprudence is certainly relevant in the sense that it must be examined in the framework of the monitoring of the execution which are the problematic issues from that period that the New Assembly Act (or the practice developing on its basis) has failed to address (e.g. the use of security measures by the police to limit the freedom of assembly outside the scope of the New Assembly Act) or might have even exacerbated (e.g. traffic-based bans).

[11] https://orszagosbiroitanacs.hu/az-obt-velemenyezte-a-kuriai-elnokenek-javasolt-szemelyt/

Accordingly, the HCLU and the HHC uphold the recommendations made and maintain that the recent modification of the exclusive judicial competence requires further monitoring of the execution of the judgments of the *Patyi and Others* case group.

Sincerely yours,



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