Hungary's Game of Non-Compliance

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Trick and Treat?

Almost a year has passed since the European Union decided to block the payment of EUR 27 billion in union funds to Hungary under several instruments. Access to the largest part of the frozen funds – altogether EUR 13 billion – depends on whether Hungary complies with its undertakings to strengthen judicial independence. The government claims to have met all four of the so-called super milestones by adopting a judicial package in May 2023 and requests access to the blocked funds under Hungary's Recovery and Resilience Fund (RRF) and ten different operative programmes. However, upon taking a closer look at the preconditions to the payments and the nature and implementation of the proposed reforms, it becomes clear that Hungary is still playing tricks to avoid compliance, especially when it comes to reforms that could have painful consequences to the ruling majority. These tricks are very technical by nature, but experience has shown that the Hungarian government can be very technical in advancing its agenda to dismantle the rule of law. Dozens of examples prove that legal details do matter, and if there is any chance that legislation can be applied to the detriment of rule of law principles, it will be applied like that.

This blog provides illustrative examples of these tricks to reveal the disappointing truth: the Hungarian government continues to lack any genuine commitment to restoring the rule of law. At this point, only one question remains: whether the EC is letting the Hungarian government get the treat despite playing tricks.

Trick #1 ~ Legal Amendment, but No Actual Change

One main objective of the reforms was to strengthen the independence of the Kúria (the supreme court of Hungary), amongst others, by amending the rules governing the status of the Kúria President. In this respect, the undertakings of the Hungarian government were twofold: to repeal the widely criticised rules allowing the election of a chief justice on a fully political basis and to exclude their re-election.

The modifications were necessary as the previous rules on appointment and dismissal were constructed to allow political control over the position of Chief Justice without any effective oversight by the judiciary. If implemented correctly, the modifications could have permitted the application of new rules on election at the latest in 2029, when the mandate of the current Kúria President expires. Yet, due to a little trick played by the Hungarian government, the amendments adopted are quite unlikely to be applied.

The trick is simple. The new legislation expressly excludes the possibility of the re-election of the Kúria President, but also stipulates that the Kúria President should remain in office until a successor is elected by a two-thirds parliamentary majority. This allows the *de facto* re-election of the Kúria President by a blocking minority. As the mandatory retirement age of judges is not applicable to the Kúria President, the current chief justice can remain in position with full powers for an indefinite period by relying on a one-third parliamentary minority.

The Kúria President plays a key role within the Hungarian judiciary. Current Chief Justice András Zs. Varga is widely seen as a political figure, not only for the outstanding circumstances of his election but also for playing an active role in constructing a new legal narrative relativising the core requirements of judicial independence.

Chief Justice Varga's election became a symbol of political interference for several reasons. It was carried out based on personalised legislation introduced a few months before the election became due. The EC immediately warned that the legislative changes lowered eligibility criteria for the position and *"de facto increased the role of Parliament in judicial appointments to the Kúria."* Five days later, András Zs. Varga was nominated for Kúria President and was eventually elected by Parliament against the manifest objection of the National Judicial Council (NJC), which opposed his nomination because *"it does not respond to the constitutional requirement according to which the person sitting at the top of the court system shall be independent from other branches."* The UN Special Rapporteur on the independence of judges and lawyers considered the election of Justice Varga *"an attack to the independence of the judiciary and an attempt to submit the judiciary to the will of the legislative branch".*

Since his election, András Zs. Varga has been trying to silence critical voices. He joined smear campaigns against members of the NJC claiming that *„decisions, communications and public appearances of the NJC are political activities."* Contradicting the spirit of the Baka case, he publicly questioned the right of judges to criticise legislation and challenged before the Constitutional Court the new Code of Ethics which allows judges to comment on legislation publicly.

His activities confirm the concerns raised by the Venice Commission, according to which the regime under which the Kúria President was elected poses *"serious risk of politicisation and important consequences for the independence of the judiciary."* The only reasonable aim of the envisaged modifications was to depoliticise the position of the Kúria President and avoid

the possibility of cementing the highest judicial position in accordance with the will of the ruling political majority. As such, by playing the little trick with the reform's implementation, Hungary practically undermines compliance. By automatically prolonging the mandate, the Hungarian government kills two birds with one stone: it not only cements the current Kúria President in his position but also avoids the application of the new rules on election.

Trick #2 ~ Say One Thing, Do Another

Another key element of the reforms was to eliminate all obstacles established in the domestic legislation to the right of Hungarian judges to make preliminary references to the CJEU, as expected by judgement C-564/19. In order to comply with the requirement to fully eliminate obstacles to preliminary references, it was necessary to terminate the legal effect of a precedential decision of the Kúria. This decision had barred recourse to preliminary references after a judge sought protection from the CJEU questioning abusive court management practices undermining judicial independence. The Prosecutor General (PG) immediately requested a review of the preliminary reference order under an extraordinary legal remedy. The Kúria established that the preliminary reference was unlawful for not raising genuine issues relating to the specific case. Although the Kúria could not stop the question from reaching the CJEU, it obstructed the freedom of Hungarian judges to make preliminary references. After all, who would turn to the CJEU risking the possibility of being singled out by the PG and cited before the Kúria for committing something unlawful? Who would dare to ask questions if these could qualify as unlawful and have detrimental consequences to their evaluation and career as judge?

Even after the precedential decision was found contrary to EU law by the CJEU, the Kúria publicly insisted that it remained in force. Explaining this situation, the Kúria President claimed that within Europe, *"there is some kind of a war going on between courts, like in Game of Thrones"* and that therefore *"the Kúria always examines whether European Union law should be followed on a given issue and then says whether or not it should be followed."* According to Chief Justice Varga, the Kúria has an *"exclusive mediating role between the other three superior courts (the Constitutional Court, the Court of Justice of the European Union and the European Court of Human Rights) and the courts of general jurisdiction. In this role, it must balance external judicial influences while at the same time serving as an internal benchmark for the other courts."*

The Kúria's insistence on being an "interlocutor" between national and international courts on a case-by-case basis resembles the Russian recipe for blocking the binding effect of international court judgments. While it is not clear what the Kúria's role could be in serving as an internal benchmark for interpreting Union law, the message towards lower tier courts is unambiguous: the Kúria keeps up the obligatory nature of the precedential decision under which all preliminary references that are not necessary to the resolution of the dispute concerned should be deemed unlawful.

Instead of terminating the binding effect of the precedential decision, the wording introduced by the judicial reform expressly confirmed the interpretation of the Kúria, ensuring that its legal force remains. This way, while Hungary claimed full restoration of judges' right to turn to the CJEU, in reality, the adopted legislation codified the legal effect of the precedential decision making sure that judges think twice before they make a preliminary reference.

Trick #3 – Compliance on Paper Only

The third trick played is the lousiest of all: claiming compliance under legislation adopted but not implemented. This trick was played with the reforms expected to enhance the transparency of the case allocation system at the Kúria. The existing case allocation system raised serious concerns for being established without effective oversight by judicial bodies, for lack of transparency and for allowing a wide possibility of human intervention and discretion, including the reallocation of cases, ultimately raising doubts about whether the adjudicating panel is 'established by law'. In this respect, the modifications undertaken by the Hungarian government were to establish an automated system where cases are allocated without human intervention to chambers following pre-established, objective criteria and where the composition of the adjudicating panel is determined by an algorithm.

The trick is banal: the rules were implemented only on paper. The reform fully complies with the milestones, but its implementation is half-hearted: not even the Kúria could provide proof of the existence of an IT system ensuring compliance with the law's requirements.

The Kúria's case allocation scheme raises the same problems that originated the need for reform: lack of transparency and a wide possibility of human intervention. Instead of establishing fixed adjudicating panels, the scheme formally assigns judges to chambers and sets out complicated rules for setting up adjudicating panels, providing countless variations for the final composition of the actual bench hearing the case. While it formally establishes not more than twenty chambers, in reality, the possible final composition of adjudicating panels amounts to a multiple of this number. The rules permit court leaders to determine the presiding judge, the judge-rapporteur and the number of members of the adjudicating chamber in practically any case. This way, instead of excluding human intervention, the scheme expressly incorporates discretionary decisions. Court leaders may even deprive presiding judges of fulfilling their role. As the process of electronic allocation does not cover the final composition of the adjudicating chamber, it is not possible for the parties to track back from the logbook on what basis the adjudicating panel has been formed. The abundance of exceptional rules built into the case allocation scheme not only incorporates human intervention, but also leaves wide margins for manipulation, creating an opaque process.

Both local and European Parliamentary elections will take place in 2024, and the Kúria holds exclusive competence to adjudicate electoral disputes. Ensuring that the Kúria's case allocation system is transparent and foreseeable will not only guarantee the right of citizens

to a tribunal established by law but is also key to guaranteeing the fairness of the European Parliamentary elections.

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