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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,

The **Hungarian Civil Liberties Union** ("HCLU") and the **Hungarian Helsinki Committee** ("HHC") hereby respectfully submit their 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**. This group of cases include

(i) the *Patyi and others v. Hungary* case (Application no. 5529/05, Judgment of 07 October 2008),
(ii) the *Szerdahelyi v. Hungary* case (Application no. 30385/07, Judgment of 17 January 2012),
(iii) the *Patyi (No. 2) v. Hungary* case (Application no. 35127/08, Judgment of 17 January 2012),
(iv) the *Sáska v. Hungary* case (Application no. 58050/08, Judgment of 27 November 2012),
(v) the *Körtvélyessy v. Hungary* case (Application no. 7871/10, Judgment of 05 April 2016),
(vi) the *Körtvélyessy (No. 2) v. Hungary* case (Application no. 58271/15, Judgment of 18 July 2017),
(vii) the *Körtvélyessy (No. 3) v. Hungary* case (Application no. 58274/15, Judgment of 03 October, 2017),
(viii) the *United Civil Aviation Trade Union and Csorba v. Hungary* case (Application no. 27585/13, Judgment of 22 May 2018) and
(ix) the *Tóth v. Hungary* case (Application no. 20497/13, Judgment of 26 May 2020).

The HCLU and the HHC are independent human rights watchdog organisations, working towards defending human rights and the rule of law in Hungary. **The present joint communication concerns the general measures described in the Group Action Report of the Hungarian Government of 29 April 2020**[1] (the "Action Report") and provides additional information not covered by the Action Report. Both the HCLU and the HHC are of the view that the Hungarian Government has failed to remedy the structural problems that led to the violations found by the ECtHR and therefore has not fully complied yet with its obligations under Article 46 Paragraph 1 of the European Convention on Human Rights (the "Convention"). Specifically:

(1) The general measures taken by the Hungarian state **fail to provide the guarantees necessary to prevent the recurrence of the violations revealed** in the cases of the group, and have further broadened the authorities' possibility to disproportionately interfere with the freedom of assembly in similar cases.

[1] DH-DD(2020)395 04/05/2020, available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016809e4aae

(2) The long standing practice of the police, the jurisprudence of the Constitutional Court and the legislative measures adopted by the Parliament **reinforce the legal basis for restricting demonstrations to be held in the vicinity of the private residence of the Prime Minister** and other prominent politicians, when in fact, it was not the lack of legal basis but the lack of a pressing social need that led to finding a violation in the leading case. At the same time, the adopted legislative measures have **created a strong chilling effect on citizens** and resulted in the **complete elimination of such assemblies**.

(3) The current legislation upholds the possibility of the police to **restrict access to any given public space at any time for security reasons and declare it unavailable for holding demonstrations, creating a permanently pending, arbitrarily applicable legal basis for banning or dissolving an assembly outside the scope of grounds foreseen by the new law on assembly.** While the right to close down public spaces for security reasons is obviously not problematic in itself and may be absolutely necessary, the problem lies in the fact that the fast track judicial review process that is otherwise applicable to bans and restrictions ordered under the new law on assembly is not available when the basis for the *de facto* ban or dissolution stemming is such a "security measure". The legislator has failed to lay down the rules through which the clash between the freedom of assembly and the potentially legitimate interests of public safety could be resolved in a procedure that could be regarded as an effective remedy for the restriction of the freedom of assembly.

(4) The new legislation adopted has **widened the grounds for traffic-related bans** and **moved the practice of the police and the jurisdiction into a more restrictive direction,** where the free flow of traffic is given a higher degree of precedence over the freedom of assembly. Instead of providing guarantees, the legislation broadened the possibility of unnecessary restriction of demonstrations.

(5) While the new law on assembly has failed to resolve the structural deficiencies that emerged in the cases of the group, it has created new problems, including **significant administrative obstacles to the unfettered enjoyment of the right to peaceful assembly**.

1. PRELIMINARY CONCERN: A SHIFT IN THE EXCLUSIVE JUDICIAL COMPETENCE

1. Although the Action Report is dated 29 April 2020, it completely overlooks an important legislative development: **as of 1 April 2020, the Curia** (Hungary's highest court) has **gained exclusive competence to rule in assembly cases.** As a result of this modification, the Curia replaced the Budapest-Capital Regional Court, the judges of which have been shaping the jurisprudence on the right to peaceful assembly for several years. Since this replacement has taken place recently, **its impact on the direction of the jurisprudence and the scope of the protection of the freedom of assembly cannot be properly assessed at this time**. Nevertheless, it is clear, that this sole modification may in itself lead to significant changes in the case-law. For this reason, the judgments summarised by the Government in the Action Report – all delivered by the Budapest-Capital Regional Court that lost its competence to adjudicate assembly cases – cannot at this point in time be deemed as giving a full and true picture of the consolidated judicial practice. The Curia itself expressly claimed in one of its judgments deviating from the previous case-law that it *"is not bound by the decisions of the Budapest-Capital Regional Court delivered in individual cases – which are in any case not available in public databases – therefore it [the Curia] has ruled on the dispute on the basis of its own interpretation the Assembly Act and the Fundamental Law."*[2]

[2] Decision no. K.I.39.441/2020/4. of the Curia, available in Hungarian at https://kuria-birosag.hu/hu/gyulhat/ki3944120204-szamu-hatarozat

2. The first judgment published by the Curia[3] already suggests that an **approach that is more restrictive than that of the former case-law might be taken by the high court**. In its decision, the Curia rejected the claim for judicial review of a ban on the basis that the organiser was not represented by a lawyer. Although it is not mentioned in the Action Report, **legal representation before courts in assembly law cases became compulsory with effect of 1 January 2018**.[4] This requirement may seem to be a mere formality, but in practice, it can create a significant administrative obstacle to judicial remedy that is difficult to overcome, as it may be very difficult to find a legal representative within the very short time period necessitated by the fast-track procedure, especially if legal aid is required. The practice of the Budapest-Capital Regional Court was divergent as to the consequences of lack of legal representation. In some cases, the court provided a deadline for the organiser of the banned assembly to remedy the lack of legal representation and allowed the organiser to secure a legal aid lawyer.[5] In other cases the court simply rejected the claim for the lack of legal representation[6] (although the legal framework seems to support the more lenient conclusion, namely that in such cases the courts are required to provide time for finding a lawyer). As shown by its first published decision, **the Curia has opted for the most restrictive approach and refused to review the resolution of the police on its merits** on the basis of the lack of legal representation. If this restrictive approach becomes the consolidated jurisprudence of the Curia, exercising the right to assembly will be dependent on whether someone has the means to retain a lawyer – preferably in advance so that he/she would not run out of the tight deadlines in assembly cases. (Although state funded legal aid is available in principle, due to the length of the granting procedure, including the obligation to acquire and attach different official documents substantiating indigence, this is not a viable option in the fast-track procedures that characterise freedom of assembly cases. Furthermore, even if the jurisprudence evolves to allow the time for the petitioner to acquire a legal aid lawyer, the assembly may lose its relevance by the time legal aid is secured.)

3. It shall also be noted that **channelling assembly cases to the Curia also entails** – in the longer run – **a wider risk of political interference in the adjudication of bans and restrictions**. A recent modification of Act CLXII of 2011 on the Status of Judges and their Remuneration[7] entitles Constitutional Court justices to become judges of the Curia once their mandate at the Constitutional Court terminates, by simply requesting so, without an application. Based on this new regulation, with effect of 1 July 2020, eight judges of the Constitutional Court were nominated to work as judges of the Curia after the termination of their mandate as Constitutional Court justices.[8] Constitutional Court justices are appointed by a two third majority of Members of Parliament. Since the governing parties have had such a majority for most of the past 10 years, the majority of the Constitutional Court justices appointed during this period have strong links with the incumbent government. This means that the Curia can slowly be filled up with judges who are politically loyal to the Government,[9] and in the longer run this may entail that politically sensitive assembly cases will be decided in a way that is favourable for the Government.

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[3] Decision no. K.I.39.006/2020/2 of the Curia, available in Hungarian at https://kuria-birosag.hu/hu/gyulhat/ki3900620202-szamu-hatarozat

[4] Act I of 2017 on the Administrative Court Procedure.

[5] Decision no. 105.K.700.085/2019/16 of the Budapest-Capital Regional Court, available in Hungarian at https://www.helsinki.hu/wp-content/uploads/anonimised_105_K_700085_2019_16_Budapest_Capital_Regional_Court.pdf

[6] Decision no. 105.K.700.881/2018/2 of the Budapest-Capital Regional Court available in Hungarian at https://www.helsinki.hu/wp-content/uploads/anonimised_106_K_700881_2018_2_Budapest_Capital_Regional_Court.pdf

[7] The modification was introduced with effect of 20 December 2019 by Act CXXVII of 2019. See more under https://www.helsinki.hu/wp-content/uploads/HHC_Act_CXXVII_of_2019_on_judiciary_analysis_2020Jan.pdf

[8] https://magyarkozlony.hu/dokumentumok/60f04856a5daf11dea3c076149c70e640a5f920d/megtekintes

[9] For an analysis of the issue see: https://helsinki.hu/wp-content/uploads/EKINT-HCLU-HHC_Analysing_CC_judges_performances_2015.pdf

4. Considering the above circumstances, currently it is too early to assess the direction of the new assembly law's jurisprudence, and more time is needed to provide a proper analysis in this regard. Therefore, **we recommend the Committee of Ministers to continue to monitor the execution of the judgments in this group of cases at least until a proper assessment of the Curia's jurisprudence can be made**.

2. THE GOVERNMENT HAS FAILED TO REMEDY THE LEGISLATIVE DEFICIENCIES LEADING TO THE VIOLATIONS

5. The Action Report of the Government cites at length the provisions of the new legislation that entered into force on 1 October 2018 (Act LV of 2018 on the Right to Assembly, hereinafter the "New Assembly Act"), describes in general terms the practice of the police and the jurisprudence, but fails to demonstrate how, if in any way, the new legislation has remedied the deficiencies that lead to the violations established in the cases of the group. As explained below, contrary to the conclusions of the Government, **the legislative developments have not addressed the specific problems, but rather reaffirmed the legal basis for potential future bans of similar nature**.

2.1. DEMONSTRATIONS IN FRONT OF THE PRIVATE RESIDENCE OF HIGH-RANKING POLITICIANS

6. The leading case of the group [the *Patyi and others v. Hungary* case (Application no. 5529/05, Judgment of 07 October 2008)] concerned the ban of a series of **demonstrations to be held in front of the Prime Minister's private residence**. In this case, the Court found that though the measure complained had been prescribed by law and had pursued legitimate aims, *"the basis for the ban on the planned peaceful assemblies was neither relevant nor sufficient to meet any pressing social need. The ban has therefore not been shown to have been necessary in a democratic society in order to achieve the aims pursued."*[10]

7. The below facts prove that the specific problem that arose in that case – namely **the prevention of demonstrations at the private residence of high-ranking politicians** without the guarantees established in the Convention – was not an isolated violation, but **an actual practice**, which as part of a wider pattern constitutes a structural problem of the Hungarian assembly law. In fact, since the judgment of the *Patyi and others v. Hungary* case became final, state authorities have been consistently seeking to impede the holding of demonstrations at the private residence of high-ranking politicians (especially, the Prime Minister). Instead of resolving the problem, the New Assembly Act has confirmed this problematic practice and further restricted the right to assembly to be exercised in similar settings.

(i) The practice of the police

Since 2011, the Prime Minister's private residence has been subject to a series of so-called "measures aimed at providing the safety of a person or a building" (*személy- és létesítménybiztosítási intézkedés*), which is an equivalent of declaring an area a "security operational zone" (c.f. § 7 of Patyi v Hungary). These measures have been used as a ground for banning and dissolving demonstrations to be held at that place. Such a measure (hereafter "security measure") can be adopted by the police or the Anti-Terror Centre (the "ATC") in accordance with Section 46 of Act XXXIV of 1994 on the Police (the "Police Act"). The security measure can be introduced by an order and fives the police the power to *"close down a given area and forbid anyone to enter or exit the area or oblige those present in the area to leave*." **For several years, the continued application of this security measure has factually eliminated the surroundings of the Prime Minister's private residence from the scope of public venues where assemblies can be held**. While at first, the security measures were introduced sporadically, with the evident aim of

[10] *Patyi and others v. Hungary* case (Application no. 5529/05, Judgment of 07 October 2008), § 44.

preventing[11] or interrupting (dissolving)[12] specific assemblies, later these have become more frequent and their periodical renewal resulted in a **permanent restriction of assemblies to be held in front of the Prime Minister's residence between October 2013 and December 2017**.[13]

(ii) Relevant jurisprudence of ordinary courts

The practice of the courts was divergent as to the legality of blocking an assembly on the basis of an effective security measure order. Ordinary courts regularly took note of the interference. In the summer of 2013 the Budapest Administrative and Labour Court declared that the security measure ordered by the ATC cannot automatically provide a ground for restricting an assembly.[14] Later on, this position was confirmed by the Curia declaring that the question whether the restriction of the right to assembly is in fact necessary and proportionate with the objectives of the security measure shall be weighed independently from the legality of the security measure.[15] However, despite these decisions, **the security measures ordered by the ATC have successfully prevented citizens from exercising their right to peaceful assembly in the vicinity of high-ranking politicians' residencies for years**.

(iii) Relevant decisions of the Constitutional Court

A similar case – concerning a banned demonstration to be held in front of the Prime Minister's residence – also reached the Constitutional Court. In its decision no. 13/2016 (VII. 18.) AB,[16] the Constitutional Court argued that the police had rightly realised that there had been a **collision between the right to assembly and the right to privacy**, but had no appropriate legislative means to respond to it, since Act III of 1989 on the Right to Assembly (the "Old Assembly Act") did not provide any option between a prior ban and the acknowledgment of the notification, and the right to privacy was not among the grounds for a prior ban: "*the reason for the restrictive approach to enforcing the law that could be seen in this case is the lack of an adequate statutory regulation that would allow for [prior] limitations and conditions that are less restrictive than a prior ban of an assembly*." As a consequence, the Constitutional Court called on the Parliament to enact appropriate legislation by the end of 2016. (It shall be noted that other complaints were also submitted to the Constitutional Court with respect to the misapplication of security measures ordered by the ATC. In

[11] In 2011, the street where the Prime Minister lives was closed down by the ATC shortly after the trade union of armed forces publicly announced a planned demonstration to be held in front of the house of the Prime Minister. By closing down the area, the ATC successfully blocked the assembly. See: https://www.origo.hu/itthon/20110603-tuntetesektol-tartva-lezartak-orban-hazanak-kornyeket.html.

[12] At the time when the ATC introduced security measure no. 6651/2013 regarding the vicinity of the Prime Minister's private residence, a duly notified static assembly was held in that area. The police practically dissolved the static demonstration at 2 a.m. in the morning. The court confirmed the lawfulness of the measure. See the constitutional complaint brought in the case at https://tasz.hu/files/tasz/imce/ab_panasz_anonim.pdf.

[13] With effect of 10 August 2012, the ATC ordered the security measure „until the time necessary" (see the resolution at https://www.helsinki.hu/wp-content/uploads/security_measure_PM_residence_20120810.pdf). Later, a new security measure was introduced in July 2013 (see https://hvg.hu/itthon/20130704_elindultak_a_devizahiteles_tuntetok). Finally, the security measure order under no. 30100/6651/2013 in October 2013 was repeatedly prolonged until 31 December 2017. See https://www.origo.hu/itthon/20150330-harom-honapig-senki-nem-zavarhatja-orban-viktort.html, and https://444.hu/2016/09/30/harom-eve-zarja-a-tek-orban-viktor-hazanak-kornyeket-es-ez-tovabbra-is-igy-marad and https://24.hu/belfold/2018/01/01/elfeledkeztek-orban-viktorrol/.

[14] https://tasz.hu/cikkek/birosagnak-kellett-helyretennie-a-rendorseget-es-a-tek-et

[15] See the judgment here: https://tasz.hu/files/tasz/civicrm/persist/contribute/files/Merkel_Tuareg_BRFK_felulvizsgalat_anonim_20170616.pdf.

[16] See the summary of the decision in English http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-2016-2-003.

two of such cases, the Constitutional Court delayed the decision for so many (almost six) years that in the end, it decided to simply dismiss the complaints on the basis that they were no longer relevant.[17] This remarkable delay in the adjudication of the complaints has at the same time **prevented the organisers from seeking remedy for the violation of their rights before the European Court of Human Rights**.

(iv) Legislative measures adopted

The legislative measures taken by the Hungarian state authorities were built upon decision no. 13/2016 (VII. 18.) AB of the Constitutional Court focusing on the protection of privacy of politicians, and **instead of resolving the deficiencies that had led to the violations under the Convention, rather reaffirmed the legal basis for restricting the right to peaceful assembly at the vicinity of the residence of prominent politicians**.

(a) With effect of 29 June 2018, Article 4 of the Seventh Amendment of the Fundamental Law amended Article VI of the Fundamental Law creating **a new constitutional basis for restricting political rights** by declaring that *"the exercise of the freedom of expression and the right to assembly shall not violate others' private and family life and their homes."* According to the detailed reasons attached to the Seventh Amendment of the Fundamental Law, "*The legislator has detected the importance of the collision of privacy rights and other fundamental rights, and therefore the Bill intends to stipulate at the level of the Fundamental Law that* ***others' right to have their private and family life and home respected may pose an external limit to the freedom of expression and the right of assembly.*** *Should the above fundamental rights collide, the Bill emphasises that these elements of privacy rights fall under enhanced protection, with a view to the general framework of the permissible limitation of fundamental rights as determined in the Fundamental Law and the practice of the Constitutional Court."*

(b) Based on this amendment of the Fundamental Law, Section 222 of Act C of 2012 on the Criminal Code (the "Criminal Code")[18] was modified with effect of 7 August 2018, introducing **a new type of criminal offence**: harassment committed against *"a public official at a place and time that is incompatible with his official duties"*. The offence is **punishable with up to three years of imprisonment**. While before the amendment citizens had at least tried to use the possibility to express their opinion in front of the residence of politicians in various forms,[19] after the entry into force of this new criminal offence, the phenomenon of **exercising the right to assembly in the residential area of politicians completely disappeared**.

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[17] See decisions no. 3354/2019. (XII. 16.) AB and 3355/2019. (XII. 16.) AB of the Constitutional Court published at http://www.kozlonyok.hu/kozlonyok/Kozlonyok/1/PDF/2019/34.pdf.

[18] According to Section 222(1) of the Criminal Code *„Any person who engages in conduct intended to intimidate another person, to disturb the privacy of or to upset, or cause emotional distress to another person arbitrarily, or who is engaged in the pestering of another person on a regular basis, is guilty of a misdemeanour punishable by imprisonment not exceeding one year, insofar as the act did not result in a more serious criminal offense. (2) Any person who, for the purpose of intimidation: a) conveys the threat of force or public endangerment intended to inflict harm upon another person, or upon a relative of this person, or b) giving the impression that any threat to the life, physical integrity or health of another person is imminent, is guilty of a misdemeanour punishable by imprisonment not exceeding two years. (3) Any person who commits the act of harassment: […] d) against a public official, at a place and time that is incompatible with his official duties, shall be punishable by imprisonment not exceeding two years in the case provided for in Subsection (1), or by imprisonment not exceeding three years for a felony in the case provided for in Subsection (2)."*

[19] E.g. in the form of writing a poem on the asphalt of the road where the Prime Minister resides https://444.hu/2018/04/11/az-egyik-rendorrol-megtudtam-hogy-az-aposa-verseket-ir or leaving hand-written messages on the fence https://hvg.hu/itthon/20170308_orban_haza_mikro_tuntetes_ot_rendor.

(c) On 1 October 2018, the New Assembly Act came into force establishing new grounds for a prior ban by the police, amongst them Section 13(4) under which a demonstration can be banned if – "*due to the technical equipment used or the duration of it*" – it is suitable to infringe *"the rights of others to privacy, to family life and home"*. The night before the entry into force of the New Assembly Act, **a symbolic last demonstration was held in front of the residence of the Prime Minister, but is was dissolved by the police at midnight when the new legislation entered into force**.[20]

8. As demonstrated above, the measures adopted by **the Hungarian state authorities have in fact widened the police's authorisation to ban or otherwise limit the types of demonstrations the banning of which was found by the ECtHR to be in breach of the Convention in the Patyi and Others v Hungary judgment**. While in principle, it would not be impossible to apply the new legislation in a Convention-compliant manner, **the direction of the legislative steps paired with the practice of the police and the newly introduced criminal sanctions have had a clear chilling effect on citizens.** This chilling effect is aptly demonstrated by the complete lack of similar demonstrations since the New Assembly Act's entry into force, which means that the **types of demonstration assessed in Patyi and Others judgment have simply disappeared** from the toolbox of citizens wishing to express their dissent with the actions of high ranking government politicians.

9. It is important to emphasise that the HCLU and the HHC do not regard limitations of the freedom of assembly on the basis of others' right to privacy to be *per se* contravening the Convention, however, there are obviously cases in which demonstrations such as the one planned to be held by Mr. Patyi back in 2004 can be justified by the circumstances (depending of course on the temporal and spatial features of the assembly). Therefore, **the fact that such demonstrations have completely disappeared from Hungarian public life as a result of the new legislation and the recent practice of the regulatory authorities shows clearly that the general issues underlying the ECtHR's judgments in the cases belonging to the Patyi and Others group have not been adequately resolved** by the Hungarian Government, which therefore has not fully complied with its obligations under Article 46(1) of the Convention.

2.2. DEMONSTRATIONS IN FRONT OF THE PARLIAMENT

10. The group of cases also comprises judgments regarding **assemblies banned in front of the Parliament**. In the *Patyi (No. 2) v. Hungary* and the *Szerdahelyi v. Hungary* case where the ban was based on a resolution of the police declaring the Kossuth Square a "security operational zone" for an indefinite period of time the Court concluded that *"that the ban on Kossuth Square at the material time was devoid of a basis in domestic law and cannot as such be regarded as 'prescribed by law'."*[21] In the *Sáska v. Hungary* case the Court found *„unconvincing the Government's argument that the restriction on the applicant's rights was necessitated by the requirement to secure the unimpeded work and movement of the MPs"*[22] and established violation of the Convention.

(i) No legislative measure adopted

11. The Action Report does not address this issue at all, most likely because **the Government has not taken any legislative step to prevent similar violations in the future**. As already described above, Section 46 of the Police Act is still in force and entitles the police to unilaterally order "measures

[20] See:
https://index.hu/belfold/2018/10/01/egy_utolsot_tuntettek_orban_viktor_haza_elott_hatalyban_az_uj_gyulekezesi_torveny/

[21] *Patyi (No. 2) v. Hungary* case (Application no. 35127/08, Judgment of 17 January 2012), § 27.
Szerdahelyi v. Hungary case (Application no. 30385/07, Judgment of 17 January 2012), § 35.

[22] *Sáska v. Hungary* case (Application no. 58050/08, Judgment of 27 November 2012), § 23.

aimed at providing the safety of a person or a building" with the purpose of guaranteeing the security of a protected person. The security measure may result in closing down an area, which means that **the police may at any time declare any given public space unavailable for holding demonstrations** during a specific period. The scope of protected persons and buildings is determined by the Government[23] therefore the security measure provides the Government with an indirect tool to ban certain assemblies. The security measure can only be contested via a specific complaints procedure prescribed under Section 92 of the Police Act that was held by the ECtHR in the Patyi v Hungary case (§ 23) to be not effective on the basis that "a procedure, which included several remittals and decisions maintaining the ban and which produced at last a decision to the contrary only after more than four years, can hardly be regarded as effective or adequate". However, when adopting the New Assembly Act, the legislature did not address this issue and did not introduce a procedure whereby a timely judicial review of both the security measure and the ban based on it could be requested by the organisers.

(ii) The practice of the police

12. Immediately after the entry into force of the New Assembly Act, a security measure was introduced to protect the undisturbed operation of the Parliament.[24] Since the entry into force of the New Assembly Act, one demonstration (organised by the opposition) was banned,[25] and another demonstration notified to be held in front of the Parliament was blocked[26] on the basis that a security measure was in force at the time and place of the planned assembly. This contradicts the Constitutional Court's practice suggesting that *"notified demonstrations related to the official actions of politically active persons shall not be held near their private residence, but possibly near their official place of work."*[27] Thus, while one of the Constitutional Court's reasons for limiting the demonstrations near the private residences of politicians was that those demonstrations could and should also be held in premises that are linked to their official activities, the police have on a number of occasions prevented organisers from expressing their dissent in such premises, such as in front of the Parliament.

13. In practice, the police routinely refer in a disclaimer included in the written memorandum taken at the pre-assembly negotiations between the organisers and the police to the possibility of subsequently ordering a security measure, informing the organisers that such a security measure can be taken any time, even after taking note of the assembly (i.e. not banning or otherwise restricting it within the statutory period at the police's disposal to do so).

14. The New Assembly Act does not contain any guarantee against this option of the police to unilaterally block a demonstration or dissolve it outside the scope of the assembly legislation, nor has the Police Act been amended, although the Constitutional Court noticed that **the police-enforced obligation to leave a certain area as a result of a security measure also constitutes a *de facto* dissolution of an assembly**.[28]

15. In sum, the structural problems giving rise to the *Patyi (No. 2) v. Hungary and the Szerdahelyi v. Hungary cases* have not been addressed by the Hungarian Government in any way, and are therefore **likely to generate similar violations in the future**. In fact, in the most recent case of the group, the *Tóth v. Hungary* case (Application no. 20497/13, Judgment of 26 May 2020), decided after the Action Report of the Government was submitted, the underlying issue was exactly that the ATC closed down the area in front of the President's office and on this basis the police prevented a demonstration

[23] See Section 46 (2) of the Police Act.
[24] See https://www.parlament.hu/documents/126480/1461089/20181015_letbizt.pdf/47356418-63ec-f779-017f-873ba48be7bc .
[25] See: https://www.helsinki.hu/wp-content/uploads/security_measure_Parliament_20181001.pdf
[26] See: https://444.hu/2018/12/07/lezarjak-a-kossuth-teret-szombat-delelott-pedig-ott-tuntetnenek-a-szakszervezetek-is.
[27] See decision no. 3354/2019. (XII. 16.) AB of the Constitutional Court, para 16.
[28] See § 14 of decision no. 3355/2019 (XII.16.) AB of the Constitutional Court.

from taking place. The fact that this all happened years after the *Szerdahelyi and Patyi (no. 2) cases* had been adjudicated by the ECtHR shows clearly that the systemic issues lying behind those cases have not been resolved by Hungary.

2.3. TRAFFIC-RELATED BANS

16. The *Körtvélyessy v. Hungary* cases and the *United Civil Aviation Trade Union and Csorba v. Hungary* case of the group concerned traffic-related bans on assemblies, where the Court established a violation of the Convention because the interference complained of was not necessary in a democratic society.

17. The New Assembly Act does not provide guarantees preventing future violations of the same kind. In fact, the wording of the new legislation has **widened the grounds for traffic-related bans**: following a 2004 amendment, the Old Assembly Act allowed the regulatory authority to ban an assembly for traffic-related reasons only "if the flow of traffic cannot be secured through any other route". The new regulation stipulates that an assembly endangers public order and therefore can be banned "*if the assembly or the announcement concerning the assembly [...] impairs the order of traffic*." The amendment has **vested the police with broad discretionary powers to restrict assemblies and thus may serve to legitimize less serious disturbances as a justification for prior bans**. The reasoning attached to Section 13 of the New Assembly Act expressly encourages the police to apply traffic bans broadly when it claims that *"Evidently, if an assembly held by a small group of people (5-10 persons) may hinder the transportation of thousands or even tens of thousands of persons, it is on the one hand capable of directly, unnecessarily and disproportionately threatening public order, but may also entail an unnecessary and disproportionate violation of the 'rights and freedoms of others', and may therefore be restricted."* In addition, the reasons attached to this Section also emphasise that the "public order" clause may not be interpreted as allowing for assemblies causing severe impediments to the traffic. This is a more extensive restriction of the freedom of assembly compared to the previously existing jurisprudence, which accepted that even serious hindrances of the traffic may be an acceptable "price" for facilitating the exercise of the freedom of assembly.

18. While the Government's Action Report cites a case where the judicial argumentation mainly reflected the jurisprudence that developed in relation to the Old Assembly Act, **a potential shift in the jurisprudence resulting from the new and more restrictive legislative framework can already be detected**. For instance, in a judgment delivered by the Budapest-Capital Regional Court, the court stated that "*the right to assembly does not imply the right to slow down the traffic*".[29]

19. It must also be pointed out that as opposed to what the Action Report claims on page 6, the traffic-related prohibiting decisions were *not* mostly related to *full* blockings of public roads, but rather to halfway road blockades that would not have fully prevented but only hindered to some extent the flow of the traffic. The above referenced decision of the Budapest-Capital Regional Court is one example, and in another case,[30] the same court also upheld a police ban of another halfway road blockade on the basis that "*the criterion of 'cannot be secured through any other route' involves not only the total impossibility of securing the flow of the traffic but the disproportionate effects of having detours as well*". In establishing the level of disproportionality in this regard, the court attached importance to the low number of demonstrators and the high number of those who would suffer from the disruption, and disregarded that any halfway road blockade causes disruption to the traffic. Furthermore, while the court accepted the reasoning of the police on the predictable disturbances the blockade would cause to

[29] See decision no. 101.K.700.142/2019/8 of the Budapest-Capital Regional Court, available in Hungarian at https://www.helsinki.hu/wp-content/uploads/anonimised_101_K_700142_2019_8_Budapest_Capital_Regional_Court.pdf

[30] See decision no. 106.K.700.122/2019/7. of the Budapest-Capital Regional Court, available in Hungarian at https://www.helsinki.hu/wp-content/uploads/anonimised_105_K_700122_2019_7_Budapest_Capital_Regional_Court.pdf

the traffic, it failed to call – as other courts did – on the police to account for the means through which the safe and free flow of the detoured traffic could have been secured (for instance prior information, traffic signals, police actions) with a view to balance the freedom of assembly with the requirements of public safety.

20. The above means that **in the field of traffic-related bans, 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. From this one might assume that if the *Körtvélyessy v. Hungary* and the *United Civil Aviation Trade Union and Csorba v. Hungary* cases emerged within today's – more restrictive – legislative framework, the decisions of the domestic authorities would not be different from those that were found to be in breach of the Convention by the ECtHR.

3. BRIEF ANALYSIS OF THE NEW LEGISLATION

3.1. GENERAL CONCERNS

21. In general terms, **the New Assembly Act has significantly widened the margin of the police to apply restrictive measures**. First, it has introduced **completely new grounds for prior bans**, the application of which is not supported by standards elaborated in the domestic jurisprudence. Second, it has **created the possibility to apply time, place and manner type prior limitations**, also constituting a brand-new legal instrument in the hands of the police without any prior domestic jurisprudence that could provide guidance in the proper balancing of colliding rights and interests. Third, it **draws up the grounds for prior restraints in very general terms**. As a result of the combined effect of the above developments, **the police have gained an overly wide discretion in applying restrictive measures,** carrying the potential of arbitrariness. Consequently, **the real test for the proper execution of the ECtHR judgments will lie in the application, and not the wording of the law. For this purpose, the thorough examination of the upcoming domestic jurisprudence is essential for assessing whether the execution of the judgments in the case group may be regarded as satisfactory.**

3.2. ADMINISTRATIVE OBSTACLES

22. The new regulation has introduced several administrative obstacles that considerably hinder or can have a chilling effect on the organisation of assemblies. These include the following:

(1) The **requirement of compulsory legal representation in assembly law cases before courts** (see above in Section 2), the non-fulfilment of which may entail the rejection of the action (e.g. challenging a police ban or prior limitation) without examination on the merits. Between 1 October 2018 and 30 April 2020, organisers requested judicial review of bans in 22 cases, out of which in 6 cases (over 27%) the action was rejected due to administrative reasons and the court refused to examine the substance of the case.

(2) The **requirement of applying one specific official electronic channel for the notification** of an assembly. In case of non-compliance (e.g. submitting the notification via e-mail), the assembly shall be considered as unnotified. At the same time, organising an unnotified assembly constitutes a petty offence, punishable with a fine up to HUF 150,000 (around EUR 450). This is a significant regression from the previous system under the Old Assembly Act, whereby a notification could be made via e-mail.

(3) **Advertising** a notified assembly about which the police have not made a decision constitutes a petty offence, punishable with a fine up to HUF 150,000 (around EUR 450). Advertising a notified, but banned assembly constitutes a criminal offence.

(4) The **obligation to restore and clean the place of the assembly** after holding the assembly. Failing to comply with this duty constitutes a petty offence and shall be punishable with up to HUF 50,000 (EUR 150).

4. RECOMMENDATIONS

Procedural recommendations

For the reasons above, the HCLU and the HHC respectfully recommend the Committee of Ministers to take the following procedural measures:

(i) **continue examining the execution of the judgments** in the Patyi and others v. Hungary group of cases, and
(ii) **move the examination process from the standard to the enhanced procedure** due to the fact that the important structural problems that were identified in the cases constituting the group have not been adequately addressed when the New Assembly Act was passed.

Substantive recommendations

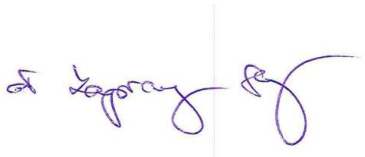
We respectfully recommend the Committee of Ministers **to call the Hungarian state to**

(iii) **create a procedure through which the judicial forum ruling in assembly cases can in a timely manner review**, and if necessary, repeal **the security measures taken by the police** serving as legal basis for restricting, banning or dissolving an assembly;

(iv) **abolish the potential criminal law consequences of exercising the right to peaceful assembly in the proximity the residence of government officials** and politicians and take measures to countervail the chilling effect of the long-standing prohibitive practice of the police and the strict limitations imposed by law in order to strike a fair balance between the right to private life of politicians and the freedom of assembly;

(v) **eliminate the administrative obstacles** incorporated in the New Assembly Act and the related regulations, including the mandatory legal representation when a ban or prior limitation is challenged, and the excessively punitive sanctions for administrative infringements of notification rules.

Sincerely yours,



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