

Submission for the Periodic Review of Hungary

February 2018

The Open Society Justice Initiative¹ makes this submission to the 122nd Session of the Human Rights Committee prior to its review of Hungary's periodic report on compliance with the International Covenant on Civil and Political Rights (ICCPR).

This submission addresses the impact of actual or pending Hungarian laws that restrict the functioning of civil society organizations (CSOs), in violation of Article 22's requirements that such restrictions must pursue legitimate aims in a democratic society. The relevant laws/proposed laws are: Act LXXVI of 2017 on transparency of organizations receiving foreign funds, and three proposed laws on the social responsibility of organizations supporting "illegal migration," on the immigration financing duty, and on immigration restraining orders, made public by the government in January 2018.² The proposed laws may be adopted before the parliamentary elections on April 8, 2018, so the Committee's review at this time is especially timely.

While the Hungarian Government and Parliament made some legislative changes in 2017 following clear and explicit criticism,³ the majority of recommendations by the UN Human Rights Council in the context of the UPR review, the European Commission on Democracy through Law ("Venice Commission"), and European Union bodies, remain unaddressed. Consequently, detailed concerns articulated by this Committee about the laws analyzed in this submission might aid in bringing the legislation into compliance with the ICCPR.

¹ The Justice Initiative, an operational arm of the Open Society Foundations, has programs in 70 countries. The Justice Initiative uses law to protect and empower people around the world. Through litigation, advocacy, research and technical assistance, the Justice Initiative promotes human rights and builds legal capacity for open societies. The Justice Initiative expands freedom of information and expression, addresses abuses related to national security and counterterrorism, fosters accountability for international crimes, combats racial discrimination and statelessness, supports criminal justice reform, and stems corruption linked to the exploitation of natural resources.

² MAGYARORSZÁG KORMÁNYÁNAK JAVASLATA A STOP SOROS TÖRVÉNYCSOMAGRÓL <http://www.kormany.hu/download/c/9a/41000/STOP%20SOROS%20T%C3%96RV%C3%89NYCSOMAG.pdf#!DocumentBrowse>
The Hungarian Government's Proposal on the Stop Soros Legislative Package (unofficial translation) <https://www.helsinki.hu/wp-content/uploads/STOP-SOROS-LEGISLATIVE-PACKAGE-PROPOSAL.pdf>

³ Illustratively, Section 3 (3) of Act LXXVI/2017 includes now a reference to proportionality; "The public prosecutor, after the repeated call as per paragraph (2), shall act in accordance with the provisions of Act CLXXV of 2011 on the Right of Association, Non-profit Status, and the Operation and Funding of Civil Society Organisations and Act CLXXXI of 2011 on the Court Registration of Civil Society Organisations and the Related Rules of Procedure, in line with the requirement of proportionality." The Venice Commission had stated in its opinion on the then draft law that it "should expressly provide for the proportionality principle under Article 3 relating to sanctions, which should only apply to instances of non-fulfilment of the most important obligations and/or to instances of serious non-fulfilment of obligations. Reference to the sanction of dissolution for failure to fulfil the obligations under the Draft Law (Articles 3(3) and 6) should be deleted." Venice Commission. Opinion on Draft Law the Transparency of Organizations Receiving Funds from Abroad, Adopted by the Venice Commission at its 111th Plenary Session (Venice, 16-17 June 2017), para. 67.

Recommendations

We encourage the Committee to ask the following questions during Hungary’s periodic review:

1. The Act LXXVII/2017, the proposed laws, and the smear campaigns⁴ against civil society organizations threaten not only individual civil society organizations, but civil society as a whole and as a consequence, democracy and the rule of law. Civil society organizations in Hungary, as in other parts of the world, have played a vital role, for example, in justice sector reform, environmental protection, awareness and education, humanitarian relief – as well as promoting open spaces for debate and exchange. How can you justify the long-term impact that this attempt to stifle and eliminate critical voices will have on the sector, the rights guaranteed under Article 22 of the ICCPR, and the future of vibrant and open debate in Hungary?
2. In regard to Act LXXVI/2017 on the transparency of organizations receiving foreign funds, the law seems to distinguish between civil society organizations (CSOs) that are more likely to be critical towards the government and those that focus on “uncontroversial” activities:
 - a. Why did Hungary adopt a law aimed only at CSOs receiving foreign funding of more than 7,200,000 HUF (approx. 24,000 Euros) per year?
 - b. Why were CSOs focused on sports, for instance, exempted from the law’s requirement?⁵
3. In regard to the three proposed laws announced in January 2018: proposed law on the social responsibility of organizations supporting illegal migration, proposed law on the immigration financing duty, and proposed law on immigration restraining orders:
 - a. Any restrictions to the right to freedom of association must be necessary in a democratic society; a democratic society requires the rule of law. Hungary

⁴ Zoltan Simons. Soros's Native Hungary Approves Crackdown on Foreign-Funded NGOs. Bloomberg Politics (June 13, 2017). Available at: <https://www.bloomberg.com/news/articles/2017-06-13/soros-s-native-hungary-approves-crackdown-on-foreign-funded-ngos> (retrieved on 7 Feb. 2018).

⁵ Hungarian Government Official Blog. Government spokesperson says so-called NGOs are the problem, not charities or volunteer organizations (April 25, 2017). Available at: <http://abouthungary.hu/news-in-brief/government-spokesperson-says-so-called-ngos-are-the-problem-not-charities-or-volunteer-organizations/> (retrieved on 7 Feb. 2018).

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already has laws criminalizing the facilitation of irregular migration. Why are new laws necessary? How will Hungary ensure that the proposed laws do not hinder or undermine public confidence in the lawful activities of civil society organizations, such as providing legal advice or representation to migrants, and monitoring and reporting on the activities of the state?

- b. Any restrictions to the right to freedom of association must be necessary in a democratic society; a democratic society respects its obligations under international law. Hungary is a party to the 1951 Convention on the status of refugees, and bound by international law to respect the right to asylum. Hungary agreed at its last Universal Periodic Review of 2016 to redouble efforts to prevent and eliminate racial discrimination, xenophobia and intolerance against migrants, refugees and asylum-seekers.⁶ How does Hungary reconcile these commitments with laws which appear to characterise lawful activities of civil society to ensure that Hungary protects refugees and which assist and support asylum-seekers as “attempts to change the composition of the population, its culture, language and religion”?
- c. Any restrictions to the right to freedom of association must be necessary in a democratic society and a democratic society includes plurality and non-discrimination. The reasoning for the draft laws claims their intent is to “hinder any attempts to change the composition of the population, its culture, language and religion.” Hungary has a diverse population with different cultures, languages and religions. Is the aim of the law to assert that Hungary has only one culture, one language and one religion? How can the aim be reconciled with the rights to freedom of expression and association of a *plurality* of opinions on questions of culture, language and religion?
- d. Is there a legitimate rationale for the selective imposition of an additional tax in the amount of 25% on foreign funds received by civil society organizations (“associations and foundations”) to use for lawful activities working with migrants (Section 4, Proposed Law on the Immigration Financing Duty)?

⁶ UPR Info. UPR: Hungary Review (2016). Recommendation 128.83 by Guatemala. Available at: https://www.upr-info.org/database/index.php?limit=0&f_SUR=75&f_SMR=All&order=&orderDir=ASC&orderP=true&f_Issue=All&searchReco=&resultMax=300&response=&action_type=&session=&SuRRgrp=&SuROrg=&SMRRgrp=&SMROrg=&pledges=RecoOnly (retrieved on 7 Feb. 2018).

- e. Is there a legitimate rationale for the imposition of excessive fines in the amounts of 200% (Section 5(2), Proposed Law on the Social Responsibility of Organizations supporting Illegal Migration) and 50% (Section 5, Proposed Law on the Immigration Financing Duty) of funds originating from abroad against civil society organizations working with migrants?

We encourage the Committee to recommend to Hungary that it:

1. Repeal Act LXXVI of 2017 on the transparency of organizations receiving foreign funds because it is unnecessary to advance a legitimate interest, in light of existing reporting and registration requirements, as well as imposing disproportionate sanctions.
2. Withdraw these three proposed laws from debate in Parliament: the proposed law on the social responsibility of organizations supporting illegal migration, the proposed law on the immigration financing duty, and the proposed law on immigration restraining orders.
3. Take active steps to promote an enabling environment for civil society and desist from promoting smear campaigns that delegitimize and undermine the crucial role that civil society organizations play.

I. INTRODUCTION

In the past few years, several laws have been adopted in Hungary, including by municipalities, which have limited democratic space and interfered with the ability of civil society organizations to operate. Such laws were adopted in a broader context of restrictive measures and vilification campaigns, including by government officials, against CSOs.⁷ For instance, the Venice Commission noted, in its opinion on the Draft Law on the Transparency of Organisations Receiving Support from Abroad that “over the past years, there have been reports of civil society organisations receiving foreign funding being described by leading Hungarian politicians as a threat to national security and independence.”⁸

Despite recommendations in the September 2016 UPR, accepted by Hungary, these laws continued to be proposed and adopted. These accepted recommendations included:

- 128.38 Refrain from targeting or restricting the activities of civil society organizations based on their political affiliation or their receipt of foreign funding (Australia)⁹

The actual and proposed laws addressed in this submission were adopted, or set to be adopted, under expedited Parliamentary procedures, without adequate consultation with civil society and the public. This was despite accepted recommendations including:

- 128.36 Ensure consultation processes which allow a public debate and interaction with the independent civil society, with sufficient time during the drafting of new laws and public policies (Switzerland);
- 128.40 Improve both formal and informal dialogue and public consultation between the Government and civil society, including on proposed legislation with an impact on human rights (Czech Republic).¹⁰

⁷ A list of government actions taken against civil society organizations was prepared in November 2017 by the Hungarian Civil Liberties Union, the Hungarian Helsinki Committee, Transparency International – Hungary and Eotvos Karoly and can be found at https://www.helsinki.hu/wp-content/uploads/Timeline_of_gov_attacks_against_HU_NGOs_short_17112017.pdf. The Venice Commission

⁸ Opinion on the Draft Law on the Transparency of Organisations Receiving Support from Abroad, adopted June 16-17, 2017, para. 21.

⁹ See UPR Info. 2RP: Responses to Recommendations and Voluntary Pledges. Hungary, 2nd review (2016). Available at: https://www.upr-info.org/sites/default/files/document/hongrie/session_25_-_avril_2016/recommendations_and_pledges_hungary_2016.pdf

¹⁰ In April-May 2017, the Hungarian government conducted the national consultation “Let’s Stop Brussels!”, which included statements and questions such as these:

This submission addresses the most recently adopted law, as well as three pieces of legislation proposed by the Government¹¹ (please see annex for an unofficial translation) that could well be passed into law before parliamentary elections in Hungary on April 8, 2018:

- Act LXXVI/2017 on transparency of organizations receiving foreign funds
- Proposed law on social responsibility of organizations supporting illegal migration (January 2018)
- Proposed law on immigration financing duty (January 2018) and
- Proposed law on immigration restraining orders (January 2018)

Law on transparency of organizations receiving foreign funds

Act LXXVI, adopted on June 13, 2017 by the Hungarian Parliament and entered into force on June 27th, 2017, imposed onerous transparency and reporting requirements on organizations that receive support from abroad, including European Union funds not transferred through a

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- “In recent times, terror attack after terror attack has taken place in Europe. Despite this fact, Brussels wants to force Hungary to allow illegal immigrants into the country. What do you think Hungary should do? (a) For the sake of the safety of Hungarians these people should be placed under supervision (felügyelet) while the authorities decide their fate. (b) Allow the illegal immigrants to move freely in Hungary.
 - By now it has become clear that, in addition to the smugglers, certain international organizations encourage the illegal immigrants to commit illegal acts. What do you think Hungary should do? (a) Activities assisting illegal immigration such as human trafficking and the popularization of illegal immigration must be punished. (b) Let us accept that there are international organizations which, without any consequences, urge the circumvention of Hungarian laws.
 - More and more foreign-supported organizations operate in Hungary with the aim of interfering in the internal affairs of our country in an opaque manner. These organizations could jeopardize our independence. What do you think Hungary should do? (a) Require them to register, revealing the objectives of their activities and the sources of their finances. (b) Allow them to continue their risky activities without any supervision.” Hungarian Spectrum. National Consultation 2017: “Let’s Stop Brussels!” (April 2, 2017). Available at: <http://hungarianspectrum.org/2017/04/02/national-consultation-2017-lets-stop-brussels/> (retrieved on 7 Feb. 2018).

The response of the European Commission can be found here: European Commission. “Stop Brussels”: the European Commission responds to the Hungarian national consultation” (27 April 2017). Available at: https://ec.europa.eu/commission/publications/stop-brussels-european-commission-responds-hungarian-national-consultation_en (retrieved on 7 Feb 2018).

The right to participation is recognized not only by Article 25 of the ICCPR but also Article 11 of the Treaty of European Union. The European Agency on Fundamental Rights has recently released a report, where it stated that “There seems to be wide agreement on the need to involve civil society organisations in policymaking, from local to EU levels. However, in the practical implementation of this concept, the various possible levels of CSO involvement and the diverse methods available for involving them are often not fully made use of. In addition, there is often a lack of clear criteria that need to be fulfilled to be recognised as a legitimate actor. The national legislator has a special responsibility to ensure that national legislation transposing EU law obligation is in conformity with fundamental rights”. European Union Agency on Fundamental Rights.Challenges facing civil society organisations working on human rights in the EU (2017), p. 39.

¹¹ Please note that this submission used as a reference the text of the proposed laws, as initially presented by the government in January 2018.

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budgetary institution. For organizations receiving foreign funds of 7,200,000 HUF (about 24,000 euros) or more, the law requires the organization to register with the regional court; provide information on the name and registered address of each foreign donor regarding donations exceeding 500,000 HUF (around 1,600 euros); provide information on total financial support, other types of support and number of donors, and state clearly on its website and in all press releases and publications that it is “a foreign-funded organization” (Article 2, Act LXXVI). The name of the organization will also be listed on a governmental portal on civil information as a “foreign-funded organization”. Sanctions include a fine, and even dissolution.

According to Hungarian organizations as well as independent experts, the law stigmatizes organizations receiving foreign funding. For instance, the UN Special Rapporteur on the situation of human rights defenders, Mr Michel Forst, stated after his visit to Hungary: “Human rights defenders who criticize the Government or raise human rights concerns are quickly intimidated and portrayed as “political” or “foreign agents.” They face enormous pressure through public criticism, stigmatization in the media, unwarranted inspections and reduction of state funding.”¹²

A number of organizations regard the law as unconstitutional and have formally applied to the Constitutional Court to annul the law. Some of these organizations have not registered and made the disclosures demanded by the law. At the end of May 2018, organizations are required to present their first annual financial reports since the law came into force. There is a concern that organizations receiving foreign funds that have not registered or made all disclosures under the law will be subject to administrative procedures, fines and even dissolution.¹³

In January 2018, the Hungarian Government presented a “legislative package,” which includes a proposed law on social responsibility of organizations supporting “illegal migration,” a proposed law on immigration financing duty, and a proposed law on immigration restraining orders (proposed laws).

As background, it is important to note that Hungary has long-standing laws criminalizing the facilitation of irregular entry and stay, including implementing European Union law

¹² OHCHR. End of mission statement by Special Rapporteur on the situation of human rights defenders, Visit to Hungary 8 - 16 February 2016. Available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17048> (retrieved on 3 Feb 2018).

¹³ Hungarian Helsinki Committee and Hungarian Civil Liberties Union. Operation starve and strangle: how the government used the law to repress Hungary’s civic spirit. Budapest, 1st February 2018.

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requirements.¹⁴ Under Articles 353 and 354 of the Criminal Code, facilitating the illegal entry, transit or stay of migrants is a criminal offence punishable by up to 2 or 3 years imprisonment, or 5 years in aggravating circumstances.¹⁵

Furthermore, Hungary ratified the 1951 Convention relating to the status of refugees and the New York Protocol to that Convention, and is bound by the European Union laws that make up to the Common European Asylum System.¹⁶ In 2017, Hungary received 3,397 asylum applications and granted residence permits to 1,291 of such applicants.¹⁷ (The number of applications represents one-quarter of 1% of the 1.3 million applications to EU states in 2016.)¹⁸

Importantly, in the 2016 UPR, Hungary accepted recommendations that Hungary “[c]ease anti-immigration campaigns and rhetoric of incitement to hatred, xenophobia and anti-Semitism and take measures to fight against hate speech and hate crimes in general” (Greece 128.106); “[c]ontinue to strengthen measures to promote tolerance and respect for cultural diversity and to counter prejudice, stereotypes, discrimination, racism and Islamophobia” (United Arab Emirates) 128.46; “[c]ontinue to take specific measures to prevent and eliminate racism, racial discrimination, xenophobia and intolerance against migrants, refugees and asylum seekers” (Egypt) 128.80; “[t]ake action against the worrying increase and public use of hate speech, most often addressed at migrants, asylum seekers but also civil society organizations and vulnerable groups” (Austria) 128.99.¹⁹

¹⁴ See European Union Directive 2002/90 defining the facilitation of unauthorised entry, transit and residence, and report to the European Parliament available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536490/IPOL_STU\(2016\)536490_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536490/IPOL_STU(2016)536490_EN.pdf)

¹⁵ See report to European Parliament, at p.99, available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536490/IPOL_STU\(2016\)536490_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536490/IPOL_STU(2016)536490_EN.pdf)

¹⁶ Directive 2011/95 on qualification for international protection; Directive 2013/32 on procedures for granting international protection; Directive 2013/33 on the reception of asylum-seekers, and Regulation 604/2013 on determining the Member State responsible for examining an application for international protection.

¹⁷ Hungarian Government, see https://www.ksh.hu/docs/eng/xstadat/xstadat_annual/i_wvvn003.html. The Hungarian Government recognised 106 people as refugees, granted 1,110 people subsidiary protection (status granted to persons who face a serious risk of death of substantial harm, but not on Geneva Convention grounds) and granted 75 persons tolerated stay.

¹⁸ 2016 is the most recent year for which full figures are available. http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_asyappctza&lang=en.

¹⁹ See also similar accepted recommendations made by Croatia (128.48), Ethiopia (128.49), Thailand (128.69), Bangladesh (128.74), Guatemala (128.83), Algeria (128.113), UPR Info. Hungary Review (2016). Available at: https://www.upr-info.org/database/index.php?limit=0&f_SUR=75&f_SMR=All&order=&orderDir=ASC&orderP=true&f_Issue=All&searchReco=&resultMax=300&response=&action_type=&session=&SuRRgrp=&SuROrg=&SMRRgrp=&SMROrg=&pledges=RecoOnly (retrieved on 7 Feb. 2018).

Proposed law on social responsibility of organizations

The first proposed law, on “social responsibility,” creates a new category of civil society organizations labeled as “supporting illegal migration,” even though the definition appears to apply to entirely legal activities of legal and social advice and assistance to asylum-seekers and migrants. Organizations deemed to fall under this category must, if they receive any foreign funding, register as such with the appropriate registration court, label themselves to the public as “organization supporting illegal migration,” and provide reports to the tax authority regarding persons and organizations receiving benefits originated from abroad. Failure to comply may lead to deregistration. This proposed law would amend Act CLXXV/2011, section 32(5), and the amended section 32(5) would be applicable to all civil society organizations (not just those supporting migrants). Section 6 of the proposed law states that organizations can only maintain their public benefit status “if at least half of the benefits received by the organization in the subject year covered by its financial report derives from supporters residing or seated in Hungary, and the amount offered by taxpayers [...] reaches at least half of the amount of the financial support received from abroad.”

According to Hungarian organizations, if the proposed law is adopted, approximately 80% of the 900 or so most prominent CSOs in the country would be at risk of losing their public benefit status.²⁰

Furthermore, this proposed law establishes in its section 5(2) that “if the organization supporting illegal migration fails to meet its obligations [regarding the provision of information, reporting to the tax authority, and creation of a separate bank account for foreign funding, among others], the prosecutor may “initiate” at the registration court that a fine be imposed in double the amount of the financial benefit originating from abroad.” This means that a fine of 200% may be imposed.

Proposed law on immigration financing duty

The second proposed law, concerning the immigration financing duty, establishes that “organizations supporting illegal migration” must pay a 25% tax on all funds received from abroad. Failure to pay the tax can lead to a fine equivalent to double the amount of the unpaid tax and dissolution of the organization—that is, a 50% fine.

²⁰ Hungarian Helsinki Committee and Hungarian Civil Liberties Union. Operation starve and strangle: how the government used the law to repress Hungary’s civic spirit. Budapest, 1st February 2018.

The imposition of a 25% tax on foreign funding could discourage some donors from providing resources to civil society organizations in Hungary on the ground that their funds could have more impact elsewhere. Moreover, donors might find it difficult to justify 25% of their funds going towards a tax and might not fund organizations subject to such a tax. Still, the tax will be used to fund “border protection,” which promotes the false message that, through their legal activities, these organizations are facilitating illegal acts.

At the same time, the imposition of excessive fines by the proposed laws on “social responsibility” and “immigration financing duty” in the amounts of 200% and 50% could lead to the closing of civil society organizations.

Proposed law on immigration restraining orders

The third proposed law, regarding immigration restraining orders, would empower the Minister of the Interior to ban individuals from an 8-kilometer strip around Hungarian borders, and to ban third country nationals from the Hungarian territory. This ban may be adopted on the basis of the Government’s opinion that the person “poses a danger to the public interest.”

According to Hungarian CSOs, the Government’s proposed laws could be adopted before the parliamentary elections on 8 April 2018. If they are not, Hungarian organizations believe that they likely will be adopted shortly thereafter, as the Government has enacted severe restrictions on civil society organizations immediately after elections in the past. Therefore, there is an urgency in addressing the threat imposed not only by the 2017 law but also by the proposed laws.

II. LEGAL OBLIGATIONS UNDER ARTICLE 22 OF THE COVENANT

Article 22 of the ICCPR guarantees that “everyone shall have the right to freedom of association with others.” The Human Rights Committee has stated that “the protection afforded by Article

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22 extends to all activities of an association.”²¹ According to the former UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, “the right to freedom of association not only includes the ability of individuals or legal entities to form and join an association but also to seek, receive and use resources – human, material and financial – from domestic, foreign, and international sources.”²²

Recommendation CM/REC(2007)14 of the Council of Europe Committee of Ministers establishes that “NGOs should be free to solicit and receive funding – cash or in-kind donations – not only from public bodies in their own state but also from institutional or individual donors, another state or multilateral agencies, subject only to the laws generally applicable to customs, foreign exchange and money laundering and those on the funding of elections and political parties.”²³ Principle 7 of the Venice Commission-OSCE Joint Guidelines on Freedom of Association further states that “associations shall have the freedom to seek, receive and use financial, material and human resources, whether domestic, foreign or international, for the pursuit of their activities. In particular, states shall not restrict or block the access of associations to resources on the grounds of the nationality or the country of origin of their source, nor stigmatize those who receive such resources [...]”²⁴

Restrictions on access to foreign funding, therefore, must be subject to the three-prong test established by Article 22 (2) of the ICCPR: “no restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.”

²¹ Human Rights Committee. Viktor Korneenko et al. v. Belarus, Communication No. 1274/2004, U.N. Doc. CCPR/C/88/D/1274/2004 (2006), par. 7.2. The Committee recognizes in this case the right to carry out statutory activities.

²² Human Rights Council. Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/23/39, 24 April 2013, par. 8. Available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.39_EN.pdf

²³ Council of Europe. CM/REC (2007) 14 of the Council of Europe Committee of Ministers to member states on the legal status of non-governmental organisations in Europe (Adopted by the Committee of Ministers on 10 October 2007 at the 1006th meeting of the Ministers’ Deputies), para. 50. Available at: <http://www.osce.org/odihr/33742?download=true>

²⁴ Venice Commission and OSCE. Joint Guidelines on Freedom of Association (2015), para. 32. Available at: <http://www.osce.org/odihr/132371?download=true>

A. Lack of legitimate aims

Act LXXVI/2017 states that it aims to promote transparency of organizations receiving foreign funds, on the basis that they “enable foreign interest groups to enforce their own interest instead of the public interest in the political and social life in Hungary.”

Although transparency may be a means to legitimate aims if linked to “*proportionate* reporting and disclosure obligations”²⁵, legitimate aims “should not be used”, as stressed by the Venice Commission in its opinion on the then draft law on transparency (current Act LXXVI/2017), “as a pretext to control NGOs or to restrict their ability to accomplish their legitimate work, and should not result in seeking to stigmatise and ostracise some of the civil society organisations solely on the basis of foreign funding. The label of ‘supported from abroad’ [established by the Act] should not give the appearance of branding NGOs with foreign funding as being deviant from proper standards. This could affect the way foreign-funded CSOs are perceived in the society and may induce a chilling effect, which inhibits cooperation with such organisations or deters foreign funders from making financial contributions”²⁶.

The Venice Commission also stated that “the comment provided in the Explanatory Memorandum [of the then draft law] might give rise to doubts as to whether the Draft Law [current Act LXXVI/2017] is, as the CoE Commissioner for Human Rights suggested, ‘based on the erroneous and harmful assumption that receiving foreign funding necessarily equals representing foreign interests that are inevitably ill-intentioned and at odds with Hungarian public interest.’”²⁷

None of these proposed laws - on social responsibility of organizations supporting “illegal migration,” on the immigration financing duty, and on immigration restraining orders - present legitimate aims; at best, they present aims that are legitimate only on the surface.

States have a duty under the Covenant to take reasonable steps to protect the safety of people who are at, or are crossing, their international borders,²⁸ and to not subject any person to

²⁵ The Venice Commission, in its opinion on the then-draft law on transparency (current Act LXXVI/2017), stated “that transparency may on the one hand reveal the possible illicit origin of the financing (whether it is a result of a criminal activity or not), but also keep the public informed of the (legitimate) sources of financing of NGOs. It is also an instrument to ensure the regularity of the procedures followed for the financing, thus enabling the authorities to react and other NCOs possibly to also apply for the funding. Transparency may therefore justify *proportionate* reporting and disclosure obligations imposed on the associations”. Venice Commission. Opinion on Draft Law the Transparency of Organizations Receiving Funds from Abroad, Adopted by the Venice Commission at its 111th Plenary Session (Venice, 16-17 June 2017), para. 39.

²⁶ *Idem*, para. 41.

²⁷ *Idem*, para. 40.

²⁸ States are required under Articles 6, 7 and 8 of the Covenant to take reasonable steps to protect persons within their jurisdiction from violations of those Articles.

refoulement.²⁹ While ensuring that these duties remain paramount, it is a legitimate aim for states to seek to maintain public order at their international borders, including by monitoring persons who cross and by refusing entry to persons who are not entitled - as a matter of international or national law - to enter the territory.

The consideration of the full text of the three proposed laws, and the accompanying explanation, leads to the understanding that their subject is *not illegal* immigration evading legitimate laws. The actual aim of these laws appears to be the suppression of the legitimate and lawful activities of civil society in providing legal and other forms of advice and assistance to individual migrants who have already entered Hungarian territory and have made - or seek advice to make - an application to remain there under Hungarian law. The proposed laws on “social responsibility” and the “immigration financing duty” apply only to civil society organizations formally established under Hungarian law,³⁰ and not to criminal organizations. The rationale for the proposed laws includes the Government’s opposition to European Union law on relocating asylum-seekers from other EU countries to Hungary (an entirely lawful process) and the text of the proposed law refers to persons applying for asylum,³¹ and to EU law instruments on allocation of state responsibility for determining asylum claims,³² as does the detailed rationale for the law.³³

Therefore, the aims alleged by the Hungarian Government in its proposed laws are both excessively vague (foster “public interest” and “social responsibility” and bar “illegal migration”) and misleading, as mentioned above. The Human Rights Committee decided (on issues of peaceful assembly) in *Nikolai Alekseev v. Russian Federation* (2013) that it is not enough to indicate general or unspecified risks³⁴ to establish a legitimate aim.

Act LXXVI/2017 and the Government proposed laws (if adopted) will further stigmatize civil society organizations receiving foreign funds within Hungarian society, due to the generalized connection made between such organizations and threats to national security, public interest,

²⁹ See *Ng v. Canada* (1993), Communication No. 469/1991; General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add. 13, 26 May 2004, paras. 10-12; and Concluding observations of the Human Rights Committee, Canada, UN Doc. CCPR/C/CAN/CO/5, 20 Apr. 2006, para. 15).

³⁰ The Hungarian language term used in Article 1 (of the proposed law on “social responsibility”) for “associations and foundations” refers to particular kinds of legal body recognised under Hungarian law.

³¹ Article 1(1), Proposed Law on Social Responsibility of Organizations supporting Illegal Migration.

³² Article 1(4), Proposed Law on Social Responsibility of Organizations supporting Illegal Migration.

³³ Explanation of Article 1, Proposed Law on Social Responsibility of Organizations supporting Illegal Migration.

³⁴ *Nikolai Alekseev v. Russian Federation*, Communication No. 1873/2009, U.N. Doc. CCPR/C/109/D/1873/2009 (2013), para. 9.6.

and national values. They might also effectively decrease CSOs' access to funds through a new tax regime (25% tax on foreign funds and change in tax-exempt status) that could, over time, discourage foreign donors from supporting Hungarian organizations.

This restriction to foreign funding is especially severe if we take into account the information provided by the European Union Agency on Fundamental Rights (FRA) concerning the consistent decrease in public funds for CSOs. According to FRA, public funding was selectively restricted in Hungary between 2011 and 2016: "organizations involved in litigation and advocacy in the fields of domestic violence, women's rights and gender equality did not receive any direct government funding other than the 1% contributions from personal income tax."³⁵

B. Lack of necessity in a democratic society

To be necessary in a democratic society, restrictions on civil society organizations should not destroy key democratic values, such as pluralism. As stated by the former UN Special Rapporteur on the rights to freedom of peaceful assembly and of association:

The rights to freedom of peaceful assembly and of association play a key role in empowering individuals belonging to groups most at risk to claim other rights and overcome the challenges associated with marginalization. Such rights must therefore not only be protected, but also facilitated. It is the responsibility of all stakeholders to ensure that the voices of individuals belonging to groups most at risk are heard, and taken into account, in compliance with the principles of pluralism of views, tolerance, broadmindedness and equity.³⁶

In *Mr. Jeong-Eun Lee v. Republic of Korea* (2005), the Human Rights Committee stated that:

The reference to a 'democratic society' indicates, in the Committee's view, that the existence and functioning of a plurality of associations, including those which peacefully promote ideas not favorably received by the government or the majority of the population, is one of the foundations of a democratic society. Therefore, the

³⁵ European Union Agency on Fundamental Rights. Challenges facing civil society organisations working on human rights in the EU (2017), p. 30.

³⁶ Human Rights Council. Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/26/29, 14 April 2014, par. 72.

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existence of any reasonable and objective justification for limiting the freedom of association is not sufficient. The State Party must further demonstrate that the prohibition of the association and the criminal prosecution of individuals [...] are in fact necessary to avert a real, and not only hypothetical danger to the national security or democratic order and that *less intrusive measures* would be insufficient to achieve this purpose (emphasis added).³⁷

The connection between democracy and pluralism has also been highlighted by the European Court of Human Rights. In the *Case of Freedom and Democracy Party (Özdep) v. Turkey* (1999), for instance, it is stated that: “as the Court has said many times, there can be no democracy without pluralism.”³⁸ And pluralism is secured not only through the protection of the right to freedom of association for political parties, as in the ECHR case, but also in the protection of the right for CSOs.

Act LXXVI/2017 and the proposed laws impose restrictions on access to foreign funding which, if implemented, would limit the pluralism of civil society. In the words of Hungarian organizations, the proposed restrictions would “starve” civil society organizations³⁹ and would result in the reduction of the number, diversity and capacity of CSOs. These restrictions are not necessary to democracy; rather, they constrain democracy.

In its Opinion 889/2017, the Venice Commission highlighted in regard to the then draft Law on the Transparency of Organizations Receiving Funds from Abroad (current Act LXXVI/2017) that the “rationale behind the exclusion of a number of associations and organisations from the scope of application of the Draft Law is not entirely clear, as the requirement of transparency should certainly apply to all civil society organisations. The relevant provision (Art. 1(4) of the Draft Law) should therefore either be justified in clearer

³⁷ Human Rights Committee. *Mr. Jeong-Eun Lee v. Republic of Korea*, Communication No. 1119/2002, U.N. Doc. CCPR/C/84/D/1119/2002 (2005), para. 7.2. Available at: <http://hrlibrary.umn.edu/undocs/1119-2002.html>

³⁸ European Court of Human Rights. *Case of Freedom and Democracy Party (Özdep) v. Turkey* (1999), para. 37.

³⁹ Hungarian Helsinki Committee and Hungarian Civil Liberties Union. *Operation starve and strangle: how the government used the law to repress Hungary’s civic spirit*. Budapest, 1st February 2018.

terms, or deleted”.⁴⁰ Article 1(4) of the Act, however, still reads merely as the following: “This Act shall not apply to: a) associations and foundations which are not regarded as civil society organisations; b) associations under the scope of Act I of 2004 on Sports; c) associations pursuing religious activities; d) ethnic minority organisations and ethnic minority associations as per Act CLXXIX of 2011, as well as the foundations that are, based on their deed of foundation, engaged in activities directly related to the protection and representation of the interests of a given ethnic minority or to the cultural autonomy of the ethnic minority.”

The means adopted to achieve the aims of the three proposed laws are even more restrictive than those adopted within Act LXXVI/2017, which were considered disproportionate or excessive by the Venice Commission. The amount of information required from civil society organizations, the amount of taxes imposed (25% of all funds received from abroad), and the quality of sanctions prescribed (which may lead to criminal punishment, fines of 50% and 200% of the foreign funds received, or even banishment from the Hungarian territory) by the proposed laws are not necessary due to existing tax laws in Hungary. Civil society organizations already provide information annually regarding their funding, whether from national or international sources, to tax authorities. They are already subject to a tax regime.⁴¹ Finally, information on CSOs, regarding the name and address of the organization and names and addresses of the organization’s representatives, is already publicly accessible in the register and in courts.

C. Discriminatory provisions

Act LXXVI/2017 and the proposed laws distinguish between organizations that receive foreign funding and organizations that do not receive foreign funds or do not receive them in significant amounts. Such a distinction affects the autonomy of civil society organizations. The Human Rights Council has called upon States “to ensure that reporting requirements placed on individuals, groups and organs of society do not inhibit functional autonomy, and that restrictions are not discriminatorily imposed on potential sources of funding.”⁴²

⁴⁰ Venice Commission. Opinion on Draft Law the Transparency of Organizations Receiving Funds from Abroad, Adopted by the Venice Commission at its 111th Plenary Session (Venice, 16-17 June 2017), para. 67.

⁴¹ It seems that taxes cannot be paid by a public benefit organization (any public benefit organization), for instance, if the preferential income under the corporate tax act (income related to the exploitation of real state) does not exceed 15 % of its total income (Subsection (7) of Section 9 of the Corporate Tax Act).

⁴² Human Rights Council. A/HRC/22/L.13 (15 March 2013), par. 9.

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In addition, the 2017 Act exempts sports organizations (Article 1.4, Act LXXVI), for instance, which are likely less prone to oppose the Government.

Act LXXVI/2017 has been challenged on grounds of discrimination, as well as violations to the rights of freedom of association, expression, information, and privacy, by Hungarian organizations before the Constitutional Court and the European Court of Human Rights,⁴³ where the case is still pending. Act LXXVI/2017 is also the subject of an action by the European Commission to the Court of Justice of the European Union for violation of fundamental rights.⁴⁴

The Government's proposed laws distinguish organizations working on immigrants' rights from other organizations, violating not only Article 22 of ICCPR, interpreted in connection with Article 2 of ICCPR, but also Article 31(1) of the UN Convention on Refugees, which establishes that "the Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

The protection of the rights of migrants is recognized even outside the sphere of international human rights law. European Union Law explicitly recognises the legitimacy of providing certain forms of support to asylum seekers and irregular migrants. Asylum seekers have, for instance, the right to "advice and counselling." Directive 2013/32 on International Protection Procedure,⁴⁵ Article 8 reads in relevant part:

Member States shall ensure that organizations and persons providing advice and counselling to applicants have effective access to applicants present at border crossing points, including transit zones, at external borders. Member States may provide for rules covering the presence of such organizations and persons in those crossing points and in particular that access is subject to an agreement with the competent authorities of the Member States. Limits on such

⁴³ Text of the application to the European Court of Human Rights is available at <https://www.helsinki.hu/en/14-hungarian-ngos-bring-echr-case-against-new-anti-civil-society-bill/>

⁴⁴ European Commission, Press Release, 7 December 2017, available at http://europa.eu/rapid/press-release_IP-17-5003_en.htm. A detailed analysis of Law XXVI/2017 violations of EU law is set out in an Opinion obtained by Open Society Foundations, available at: <https://www.matrixlaw.co.uk/resource/hungarian-ngo-funding-law-breach-eu-fundamental-freedoms-charter-rights-opinion-jessica-simor-qc-angelina-welsh-osf/>

⁴⁵ Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013L0032>

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access may be imposed only where, by virtue of national law, they are objectively necessary for the security, public order or administrative management of the crossing points concerned, provided that access is not thereby severely restricted or rendered impossible.

Applicants “shall not be denied the opportunity to communicate with UNHCR or with any other organization providing legal advice or other counselling to applicants in accordance with the law of the Member State concerned.”

Asylum seekers also have the right to free legal assistance and representation in appeals, under Directive 2013/32, art 20(1): “Member States shall ensure that free legal assistance and representation is granted on request in the appeals procedures provided for in Chapter V. It shall include, at least, the preparation of the required procedural documents and participation in the hearing before a court or tribunal of first instance on behalf of the applicant.”

According to Directive 2008/115,⁴⁶ Articles 13(3) and 13(4), irregularly staying migrants who are subject to a Government’s decision to return “shall have the possibility to obtain legal advice, representation and, where necessary, linguistic assistance”. Also, “Member States shall ensure that the necessary legal assistance and/or representation is granted on request free of charge in accordance with relevant national legislation or rules regarding legal aid, and may provide that such free legal assistance and/or representation is subject to conditions as set out in Article 15(3) to (6) of Directive 2005/85/EC.”

Conclusion

The Hungarian state has failed to comply with Article 22 of the ICCPR. Act LXXVI of 2017 and the three proposed laws, either have illegitimate aims, or aims that are legitimate only on the surface, and which proscribe means that are unnecessary to achieve a legitimate aim. Their actual aim appears to be the suppression of the legitimate and lawful activities of civil society organizations. We urge the Human Rights Committee to express its concerns in clear and detailed language during its review of Hungary’s periodic report.

⁴⁶ Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32008L0115>

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