

From Forced Self-Incrimination to Bans to Enter Border Areas The Eötvös Károly Institute's Analysis of the "Stop Soros" Legislative Package

The Hungarian government published its proposal on the "Stop Soros" legislative package on 18 January 2018, announcing that it will submit the draft for public debate. The draft intends to introduce the category of organizations supporting illegal migration. Civil society organizations falling into this category would be obliged to register and submit detailed statements on their foreign funding and, if they fail to comply with these obligations, they may have to face a fine of twice the amount of their foreign funding or even the dissolution of the organization. The organizations concerned would have to pay a quarter of their foreign funding as duty, and they could prove only subsequently that the funding did not aim to promote illegal migration. The Act would authorize the Minister of the Interior to ban even Hungarian citizens from entering the 8 km area surrounding the border. Moreover, it would introduce stricter requirements for all civil society organizations in order to obtain public benefit status and the related tax allowances, in such a manner that the great majority of these organizations would be clearly unable to meet the requirements. The draft has not been submitted to Parliament yet, but according to statements by the members of the government, they would like the National Assembly to vote on the package in February.

The 2018 Hungarian parliamentary elections are set to take place on April 8th. It is of the utmost importance that government policies are debated freely and publicly during the period before the election. Without this, citizens cannot make responsible decisions on who they should entrust with the power of government for the next four years. However, the government's purpose with this draft law is by no means to promote a genuine public discussion of asylum policy, migration or civil society. On the contrary, this package fits into the government's communication campaign and series of measures launched several years ago, which has questioned the right to participate in public life and to express opinions freely of civil society members who are critical of the government. If this package is passed, the legal instruments introduced by it will threaten the very existence of the civil society organizations it targets.

For the time being, the government targets mainly organizations and not people in this legislative package, but the drafts also envisage measures (e.g. immigration restraining orders) that may limit the fundamental rights (e.g. the freedom of movement) of natural persons. If the National Assembly passes this package, we will be one step closer to a situation in which every citizen can ask to what extent he may criticize the government or behave in a way that is not to the government's liking without risking state repression.

The Eötvös Károly Institute supports *real* public discussion, which must consider the following issues in connection with the legislative package:

I.

1. On its website, the government says that everyone "can express their opinion" on the "Stop Soros" legislative package by writing to the e-mail address provided on the website. **It shows the false nature of the initiating a public debate** that no deadline has been set for sending the opinions, and that they have to be sent to the e-mail address of the Cabinet Office of the Prime Minister, instead of the ministry responsible for the legislation. Furthermore, the Minister leading the Cabinet Office of

the Prime Minister announced that the only subject of the “public debate” can be the tightening of the laws.

Due to the government’s acts, **the institution of public debate has become toothless over the past seven years.** It has become increasingly common for the most important draft laws not to be submitted to Parliament by the government, which is responsible for their preparation, but by individual Members of Parliament, in order to avoid public debate. The reason for this is that there is no statutory requirement for the public discussion of draft laws submitted in this manner. Furthermore, the average period provided for commenting on those proposals submitted by the government which must be submitted for public discussion is six days, which rules out the possibility of a meaningful review. Essentially, it is difficult to follow, and thus to check the number, the identities and the opinions of people who commented on draft laws.

2. In essence, the new legal institutions proposed by the draft laws (the category of organizations supporting illegal migration, the immigration financing duty and the immigration restraining order) are unconstitutional because **their purpose and effect is to restrict the expression of opinions critical of the government.**

The first draft law proposes **the introduction of an obligation of registration and reporting for “organizations supporting illegal migration”.** The criteria for being classified into this category (*sponsoring* or *otherwise supporting* the illegal entry, relocation and residence of third-country nationals) are so vague that **they do not meet the minimum level of the clarity of norms arising from the principle of legal certainty.** If this draft law is adopted, it could be used against any organization operating as an association or a foundation with a registered office in Hungary, if its activity is not in line with government policy.

The text of the law contains no criteria at all for establishing its personal scope, but according to the explanatory note attached to the package, it targets organizations “propagating” migration. This also suggests that classification as an organization supporting illegal migration may result not only from acts but also from *opinions* questioning the government’s migration policy. Such classification and **the application of the related restrictive and punitive legal consequences can thus be based specifically on the fact that the opinions concerned are critical of the government.** This is contrary to the view, which is also firmly entrenched in the practice of the Hungarian Constitutional Court, according to which the freedom of expression cannot be limited based merely on the content of the opinion expressed.

Pursuant to the draft law, the organizations concerned must register themselves as organizations supporting illegal migration. Although the explanatory note emphasizes that these regulations must be distinguished from criminal provisions (e.g. human trafficking), it follows from the provisions, which prescribe restrictive and punitive legal consequences, that the legislator also considers the activities of these organizations to be illegal. Therefore, in essence, the obligation of self-registration **obliges some unidentifiable persons to incriminate themselves,** despite the fact that the right not to incriminate oneself is no longer applicable only in criminal proceedings but is a general principle.

3. The second draft law intends to introduce an **immigration financing duty.** The duty would have to be paid by those organizations supporting illegal migration that received foreign funding for the purpose of facilitating unlawful entry, relocation and residence in the territory of Hungary or that sponsor and support such activity from

benefits received from abroad. The duty is based on their foreign funding, 25% of which must be paid as duty.

The draft law itself establishes a connection between the “duty” and the alleged losses caused to the national budget by those foundations and associations stigmatized as organizations facilitating illegal immigration. The “hindering [of] any attempts to change the composition of the population, its culture, language and religion” are also mentioned here as the purpose of duty payment. According to this, by paying the duty, the organization supporting illegal migration “compensates” for a presumptive loss of an unproved amount, or the Act imposes the duty as a sanction for conduct that does not match any factual situations included in the Criminal Code but is linked to such factual situations on some uncertain basis. Thus, in reality, the draft law **conceals a penalty tax by using the term “duty”**. The legislator may use his taxation power constitutionally for the achievement of many different goals, and thus he may also use it to influence the behavior of taxpayers. However, taxation can only be regarded as a constitutional measure as long as it serves the purpose of the general and proportionate payment of taxes. It is therefore unconstitutional if taxes work as quasi-sanctions.

In addition to punishing the members of civil society who are critical of the government, the obligation to pay this duty may also **paralyze those expressing opinions criticizing the government’s migration policy**.

4. The third draft law intends to introduce the institution of the **immigration restraining order**, which would enable the minister in charge to ban from the areas adjacent to the Schengen border any person whose residence in Hungary is contrary to the national security interests of the country or poses a threat to the public interest.

It violates the spirit of constitutionalism in itself if a *minister* can establish even regarding *Hungarian citizens* that their residence in Hungary is contrary to national security interests. Prohibition from residing in a particular area is a sanction included in the Criminal Code as a penalty, which, accordingly, can only be imposed by a court for the commission of criminal offences specified in the Criminal Code, at the end of criminal proceedings conducted in accordance with the applicable procedural guarantees. The immigration restraining order, in other words, the ban from entering the 8 km area surrounding the border – as also stated in the draft law – is a legal institution that is *identical* to the legal consequence of prohibition from residing in a particular area; however, the former could be ordered by the Minister of the Interior according to a procedure to be regulated by a future government decree. Thus, in essence, the draft law **would widen the scope of application of the prohibition from residing in a particular area, under a different name, without applying the procedural guarantees relating to the imposition of such a penalty**. The legal institution of the immigration restraining order circumvents the judicial guarantees related to the prohibition from residing in a particular area.

II.

The legislative package is **part of a series of attacks against the members of civil society**. The government intends to stifle and discredit organizations criticizing it through a campaign it has been systematically building since 2013, falsely stating from the outset that these organizations serve foreign interests. George Soros and the Open Society Institute founded by him appear as major enemies in state propaganda, which has been linked with the hate campaign against refugees. The attacks and the attempts at stifling civil society have become increasingly intense. In the meantime the government – mainly following the Russian example – has started

to create its own fake civil society, the GONGOs (government organized non-governmental organizations), which it could hold up as examples, thereby separating civil society organizations that perform activities which are useful for Hungarians from those that cause damage according to the government.

An important event in the series of attacks launched against civil society was the adoption last June of Act LXXVI of 2017 on the Transparency of Organizations Receiving Foreign Funds, which obliges associations and foundations receiving more than HUF 7.2 million in foreign funding to register. These organizations are required to include their classification as an “organization receiving foreign funds” in their publications. The recently published legislative package **resorts to harsher measures in many respects:**

<p>To whom does it apply?</p> <p>Under what conditions?</p>	<p>Act LXXVI of 2017 on the Transparency of Organizations Receiving Foreign Funds</p> <p>Associations and foundations classified by the Act as organizations receiving foreign funds.</p> <p>A seemingly objective condition: foreign support of HUF 7.2 million.</p>	<p>The Hungarian Government’s proposal on the Stop Soros legislative package</p> <p>In addition to associations and foundations which are classified by the package as organizations supporting illegal migration, it also affects all organizations with a public benefit status, even if according to the draft law they would not be classified as organizations supporting illegal migration.</p> <p>An arbitrary condition, which makes no sense legally: supporting the entry to or residence in Hungary of third-country nationals in any manner.</p>
<p>How are they described?</p> <p>What consequences are attached to this classification?</p>	<p>“Organization receiving foreign funds”: having regard to the government campaign, this term is stigmatizing in the political context.</p> <p>Registration and the inclusion of the designation “organization receiving foreign funds” in publications. A failure to comply with these obligations may result in a fine or the dissolution of the organization.</p>	<p>“Organization supporting illegal migration”: this term implies that these organizations are unlawful.</p> <p>In addition to the requirement of registration (and in the case of a failure to register, the fine or the dissolution of the organization), the punitive tax collected in the form of a duty and the loss of the public benefit status – regardless of the classification of the organization – remove the financial basis of operation.</p>
<p>Does it affect any natural persons?</p>	<p>It only applies to organizations, i.e. legal entities.</p>	<p>It also affects natural persons, as it will be possible to ban them from the 8 km zone surrounding Schengen entry points.</p>

III.

The legislative package **would add new criteria to the conditions of public benefit status.** According to this, public benefit status could only be held by organizations that receive at least half of their funding from supporters in Hungary; furthermore, their income from donations under the scheme which allows taxpayers to donate 1% of their personal income tax to a CSO must reach at least half of their foreign funding. This new rule would not only affect those organizations classified as associations and foundations supporting illegal migration, but also all public benefit organizations, which would lose their public benefit status if they failed to comply with these requirements. Losing the public benefit status will have several serious consequences: certain benefits provided to private individuals will become taxable, and supporters will be unable to claim tax allowances for grants paid to an organization that lost its public benefit status.

The legislator has a wide discretion to design the tax system, in particular to determine exemptions and allowances, but it cannot violate the requirement of equal treatment. Accordingly, any discrimination regarding tax allowances is unconstitutional if there is no reasonable and objective cause behind it; in other words, if it is arbitrary. The new criterion the public benefit status included in the Stop Soros bill fails the test of reasonableness. And for public benefit non-profit business associations that are not allowed to collect 1% donations, it is downright impossible to meet this requirement.

Although the draft law presumes that the amount of 1% donations reflects the social support of the organization concerned, the new criterion makes the public benefit status dependent on the extent of the 1% donations *only on the surface*. Suppose that organization "A" and organization "B" both collect HUF 200,000 from 1% donations. The only difference between them is that while organization "A" does not accept foreign funds, organization "B" does, in the amount of HUF 500,000. According to the planned new regulation, organization "B" – which receives foreign funds – loses its public benefit status, whereas organization "A" can retain its status despite the fact that both organizations received the same amount from 1% donations. It is thus clear that **public benefit status is not based on greater social support in Hungary; instead, one of the above organizations is excluded from the public benefit status because of the funds it received from abroad**, despite the fact that the two organizations received the same amount of funds from Hungary. In fact, the new condition does not measure the organizations' social support in Hungary; it is not capable of this, and therefore it is arbitrary.