



Hungarian Helsinki Committee



The Registrar
European Court of Human Rights
Council of Europe
67075 Strasbourg-Cedex
France

Budapest, 22 August 2017

Subject: Third party intervention concerning the case ECODEFENCE and others against Russia and 48 other applications (Application no. 9988/13 and others)

Dear Sir/Madam,

As a response to your letter dated 3 July 2017, informing the Hungarian Helsinki Committee that the President of the respective Section had granted leave for the Hungarian Helsinki Committee, the Hungarian Civil Liberties Union, Transparency International Hungary, Átlátszó.hu and the Eötvös Károly Policy Institute to make written submissions, we hereby respectfully present the NGOs' submissions as a third party intervention concerning the case of ECODEFENCE and others against Russia and 48 other applications (Application no. 9988/13 and others).

1. The context and significance of the particular case

The importance of the Russian "Foreign Agents Act" shall be evaluated in the context of democratic backsliding and its spread all over the world. President Putin's Russia is definitely a model country of illiberalism and several European countries have successfully implemented the Russian pattern by now, therefore the stakes of the Court's decision are immensely high.

As Zakaria¹ pointed out in his 1997 study, illiberalism puts an end to the coexistence of constitutional liberalism and democracy, which results in the emergence of states where the elections are still – at least relatively – free, but at the same time all the characteristics of authoritarian regimes are manifested. Illiberalism and populism go hand in hand, eroding individual liberties, and the

¹ Zakaria, F. (1997) 'The Rise of Illiberal Democracy' *Foreign Affairs*, Vol. 76, No. 6 (Nov. - Dec., 1997), pp. 22-43. <http://www.seep.ceu.hu/alpsa/articles/zakaria.pdf>



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values of equality and tolerance. These systems justify themselves by constantly pointing out some external enemy, who will serve as an excuse for cutting back freedom and personal liberties. This systematic attempt takes advantage of the ancient human instinct that warns us to beware of strangers, and deliberately creates distrust in foreigners which undermines the foundations of the European community.

Non-governmental organizations are just one of the victims of the need of illiberal states for enemies which have a dual advantage from the perspective of these governments: beyond the justification for the shrinking space of fundamental rights, the stigmatization of NGOs discredits those who raise their voices against the detrimental activities of the government. According to this rhetoric, criticizing the government means criticizing the nation itself, which makes it easy to exclude them from the discussion.²

Considering this hostile attitude to civil society, Russia's example was proven to be particularly contagious, even if Russia regularly claims that the model of the relevant legislation was the Foreign Agent Registration Act (FARA) of the United States.³ This analogy is deeply problematic, as the main difference between the FARA and the "Foreign Agents Act" is that the FARA is targeted not at civil society but professional lobbyists, who are directly engaged in political activities. In this regard, political activity is the main point, as these political players act on behalf of governments which is literally the exact opposite of what non-governmental organizations do.⁴

² https://bbj.hu/politics/govt-rejects-freedom-house-report-as-work-of-soros_131100

³ <https://imrussia.org/en/analysis/politics/455-fara-and-putins-ngo-law-myths-and-reality>

⁴ E.g. the latest FARA-report contains data on six Russia-related organizations which conduct different activities as lobbying, PR activities, and the promotion of media and trade relations – but not general rule-of law defending activities – acting e.g. on behalf of the Foreign Minister of the Russian Federation among others.

https://www.fara.gov/reports/FARA_DEC_2016.pdf



From the beginning of the presidential term of Vladimir Putin in 2000, Russian authorities went a long way further in diminishing the freedom of civil society, and putting opposition movements and independent media under pressure.⁵ The Russian model of targeting civil society was first used by Azerbaijan in 2009, and then the Kyrgyz Republic,⁶ Tajikistan,⁷ Kazakhstan,⁸ Armenia,⁹ Bosnia and Herzegovina,¹⁰ and Macedonia.¹¹ Most recently, Turkey charged six human rights activists with aiding terror groups.¹² This case is an illustrative example of how an illiberal government's rhetoric creates links between terrorism and civil society without the slightest suspicion that could be considered reasonable.

Bill T/14967 (the "Hungarian Bill") was adopted by the Hungarian Parliament with minor modifications on 13 June 2013 becoming Act LXXVI of 2017 on the Transparency of Organizations Receiving Foreign Funds (the "Hungarian Law"). Since submitting the Request for leave to intervene, the law entered into force. The next country in the Eastern European region taking steps against civil society will be Poland in all probability, as the Polish prime minister announced plans to "bring order to the whole sphere of NGOs".¹³ The decision of the Court will be a clear message, might strengthen the civil society in Europe, and counter the trend demonstrated above.

⁵ The spread of illiberalism was analyzed in details by Átlátszó.hu (in Hungarian): <https://vilagterkep.atlatszo.hu/2017/04/19/osszeomlik-a-globalis-civil-tarsadalom-itt-az-atlatszo-nagy-illiberalis-korkepe/>

⁶ <http://www.icnl.org/research/monitor/kyrgyz.html>

⁷ <http://www.icnl.org/research/monitor/tajikistan.html>

⁸ <http://thediplomat.com/2015/10/kazakhstan-considering-a-new-ngo-law/>

⁹ <http://www.euractiv.com/section/armenia/opinion/armenia-s-anti-ngo-laws-inspired-by-moscow/>

¹⁰ <http://www.reuters.com/article/bosnia-law-ngo-idUSL5N0Y63DK20150515>

¹¹ <http://www.balkaninsight.com/en/article/macedonia-s-ngos-face-inspections-after-political-threats-12-20-2016>

¹² <https://www.theguardian.com/world/2017/jul/18/turkey-holds-six-rights-activists-on-charges-of-aiding-terror-group>

¹³ <https://www.theguardian.com/world/2016/nov/28/polish-pm-beata-szydoa-angers-human-rights-campaigners-ngos>



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2. The relevance of the Hungarian Law and international reactions to it

a. The Hungarian Law and its similarities with the “Foreign Agents Act”

It is hard not to notice the similarities between the Hungarian Law and the “Foreign Agents Act”, regarding the intentions, content and, in some parts even the wording of the two documents (most notably Article 24.1. of the Russian law). Both laws’ starting point is that the foreign funded organizations, through their societal influence, represent foreign interests, therefore they may pose a high risk to national security and sovereignty.¹⁴ The Parliamentary Assembly of the Council of Europe (“PACE”) stated that the Hungarian Bill was “inspired by the corresponding Russian law”.¹⁵ Both laws are irrespective of the origin of the funds (ie. government or private; countries considered to be allies or not etc.) and of their percentage in an NGO's overall budget. The obligations of the NGOs supported from abroad are similar: (i) the NGOs are labelled, and must register themselves with the label, (ii) the list of the relevant NGOs is made public on a government website, (iii) the NGOs shall also annually report about their foreign funding, including the donors and transactions and the sum of the foreign donation, (iv) the label should also be marked on the NGO’s website and be indicated on all of its publications, similarly to the “Foreign Agents Act”, (v) the NGOs are disengaged from the obligations if they do not receive foreign funds in three consecutive years. However, there are some differences too: the Hungarian Law does not use the word ‘agent’; its scope is wider as it is not limited to the NGOs that are politically active; and defines a threshold for the foreign funds under which the law is not applicable.

b. International reactions to the Hungarian law

The Hungarian Bill was denounced by a number of international figures and institutions responsible for safeguarding democracy, a number of which called for the substantial amendment or withdrawal of the bill. The interveners draw

¹⁴ See Art. 2.6 of the Russian law and the Preamble of the Hungarian law.

¹⁵ <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23715&lang=en>



the attention of the Court to these comments, because of the similarities between the Russian and the Hungarian laws. The reactions to the Hungarian law show that there exists a European consensus that laws such as the “Foreign Agents Act” violate European standards.

*i. Expert Council on NGO Law: Opinion on the Hungarian Draft Act on The Transparency of Organisations Supported From Abroad*¹⁶

The Expert Council on NGO Law examined the compatibility of the Hungarian Bill with international standards and best practices. The opinion concluded that the Hungarian Bill “gives rise to concerns with respect to its compatibility with the Convention and other recognized international standards and principles especially regarding the compatibility of the Bill with the rights to freedom of association, expression, participation in the conduct of public affairs, privacy and ability of NGOs to seek, receive and use resources.” [85] Chief concerns were: signaling out NGOs based on their income from abroad and creating special category that will result in further regulation and labelling; discriminatory treatment of such NGOs; additional burdensome reporting requirement and sanctions for those NGOs. The Expert Council therefore called the authorities not to adopt the Bill and to find strength to embrace the diversity of opinions that form the fabric of a democratic society. [92]

*ii. Letter from the Council of Europe Commissioner for Human Rights to the Speaker of the National Assembly of Hungary, CommDH(2017)14*¹⁷

Nils Muižnieks, Commissioner for Human Rights raised his concerns about the Hungarian Bill and expressed his concerns that the imposition of a standard label creates a real risk of creating negative stereotypes about NGOs that receive funds from abroad as “foreign agents”, discrediting such NGOs and causing a

¹⁶ <https://rm.coe.int/168070bfbfbb>

¹⁷ <http://www.coe.int/en/web/commissioner/-/commissioner-calls-on-hungary-s-national-assembly-to-reject-law-on-foreign-funded-ngos>



chilling effect on their activities. He compared the Hungarian Bill to the “Foreign Agents Act” and stated that foreign-funded NGOs should not be penalized, stigmatized or put at any disadvantage whatsoever on the basis of the origin of their funding. The Commissioner added that to his knowledge, NGOs in Hungary are already required to report in full and with complete transparency on their funding and activities; it is therefore difficult to grasp what legitimate purpose would be served by the additional administrative burden that the new law seeks to impose on some of them. According to the Commissioner, the severe sanctions risks destroying the very essence of the right to association protected by Article 11 of the Convention. The Commissioner also noted his impression that the Hungarian Bill sought to establish an artificial link between receiving foreign funding and criminal activity of NGOs who are of key importance for the functioning of any healthy democratic society. While they should operate in all transparency, any restrictions placed on them must be proportionate to the legitimate aims they seek to achieve.

iii. Parliamentary Assembly of the Council of Europe Resolution 2162 (2017) of 27 April 2017¹⁸

In its Resolution the Assembly outlined the international context of the Hungarian Bill and stated that the “alarming trend seems to be spreading in Europe. The Assembly agrees that NGOs must be transparent about their sources of funds, but cannot accept the allegations that NGOs serve foreign interest groups, rather than the public interest, and may endanger the national security and sovereignty of a country simply because they receive foreign funding.” [4] The Assembly was concerned about a number of issues that the Hungarian Bill raised with respect to freedom of association and of expression and the right to privacy, in particular as regards: (i) the lack of public consultation prior to its submission to parliament, (ii) the obligation for NGOs receiving foreign funding

¹⁸ <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23715&lang=en>



to indicate this on all the materials published or distributed, (iii) the obligation for NGOs to submit detailed personal data of foreign donors, including private individuals, (iv) the gravity of the sanctions provided in the Bill, (v) the scope of application of the Bill, which applies to certain associations and excludes others, such as sports and religious organizations. [6]

iv. UN Special Rapporteurs on the Bill T/14967 on the Transparency of Organizations Financed from Abroad - OL HUN 2/2017¹⁹

Three Special Rapporteurs of the United Nations jointly addressed a letter to the Hungarian government on the Hungarian Bill. They were strongly concerned that the Bill appears to discriminate against, and delegitimize NGOs that receive funding from foreign organizations or individuals, and has the potential to stigmatize their work. By forcing NGOs to use a label such as “foreign-supported organization” in their public communication, regardless of how the NGOs identify themselves, the Bill would curtail the NGOs’ rights to freedom of expression and association. Additionally, they were concerned that the sanctions imposed by the Bill are not proportionate.

v. European Commission for Democracy Through Law (Venice Commission): Opinion 889/2017 on The Draft Law On The Transparency Of Organisations Receiving Support From Abroad. CDL-AD(2017)015²⁰

The Venice Commission (“VC”) adopted its opinion on the Hungarian Bill. The opinion analyzed its compatibility with the applicable Council of Europe standards. The VC made clear that while on paper certain provisions requiring transparency of foreign funding may appear to be in line with these standards, the context surrounding the adoption of the relevant law and specifically a virulent campaign against NGOs receiving foreign funding, portraying them as acting against the interests of society, may render such provisions problematic,

¹⁹ <http://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=21617&LangID=E>

²⁰ [http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2017\)002-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2017)002-e)



raising a concern as to whether they breach the prohibition of discrimination, contrary to Article 14 of the Convention. In particular the label risks stigmatizing such NGOs, adversely affecting their legitimate activities and having a chilling effect on freedom of expression and association. [65] According to the VC, the legitimate aims of ensuring transparency of NGOs in order to prevent undue foreign political influence and the fight against money laundering and the financing of terrorism, cannot be used as a pretext to control NGOs or to restrict their ability to carry out their legitimate work. This effect would go beyond what is necessary to achieve the legitimate aim of transparency which is alleged to be the only aim of the law. [66] According to the VC, the law “will cause a disproportionate and unnecessary interference with the freedoms of association and expression, the right to privacy, and the prohibition of discrimination”. [68]

3. The “Foreign Agents Act” violates the Convention

The “Foreign Agents Act” violates the Convention because there is no pressing social need for the interference with the Applicants’ rights and freedoms protected by Articles 10 and 11 of the Convention and the restrictions are disproportionate in light of the pursued aim. The applicants also have suffered discrimination in the enjoyment of their Convention rights in contradiction with Article 14 of the Convention read in conjunction with Articles 10 and 11; and the restrictions on the applicant organizations are applied for purposes other than those envisaged by Article 10 and 11 of the Convention, contrary to Article 18 of the Convention.

a. The “Foreign Agents Act” is not necessary in a democratic society

There is no pressing social need in a democratic society for the interference with the applicants’ rights by the “Foreign Agents Act”. The measures prescribed by the law are disproportionate to the declared aim of transparency and the obligations to register and to report on activities with the possibility of unscheduled inspections are overbroad compared to the aim pursued. The



mandatory labeling of NCOs and all of their communication as “foreign agent”, according to experts and opinion polls, carries the connotation of “traitor” or “spy”.²¹ This labeling requirement is in fact capable of undermining the possibility of NCOs to carry out their work and is capable therefore to contribute to the self-censorship and ultimately to the termination of NCOs’ work.²² These consequences, supplemented by the excessive sanctions prescribed by the law are disproportionate compared to the aim pursued.

b. The “Foreign Agents Act” is discriminatory

The “Foreign Agents Act” discriminates in two ways: first, it discriminates against NCOs receiving funds from abroad, and, second, it discriminates between foreign-funded NCOs which carry out “political activities” and which do not. The “Foreign Agents Act” discriminates against NCOs receiving funding from abroad: these NCOs are subject to the administrative and labeling burdens while those not receiving foreign funding are exempt from them. According to the Court, barring an NCO from financial resources is an interference with its Convention rights²³ and the Court did not accept the foreign origin of an NCO to be a legitimate ground for difference in treatment.²⁴ Likewise, the origin of the sources of funding should also not be accepted as a legitimate ground for differential treatment.

Moreover, Article 11 must be considered in the light of Article 10.²⁵ It bears two consequences: first, as freedom of expression is one of the essential foundations

²¹ <https://rm.coe.int/third-party-intervention-by-the-council-of-europe-commissioner-for-hum/1680731087> paras. 7-9, 26-37

²² <https://rm.coe.int/third-party-intervention-by-the-council-of-europe-commissioner-for-hum/1680731087> para. 33

²³ *Ramzanova and Others v. Azerbaijan*, No. 44363/02, 1 February 2007, paras. 59-60; *Parti nationaliste basque – Organisation régionale d’Iparralde v. France*, No. 71251/01, 7 June 2007, paras. 37-38

²⁴ *ECtHR, Moscow Branch of the Salvation Army v. Russia*, Application, No. 72881/01, 5 October 2006, paras. 81-86.

²⁵ [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)025-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)025-e) para. 73



of a democratic society,²⁶ it should be limited narrowly. This protection extends to a significant extent to Article 11, because one of the key elements of freedom of association is to distribute opinions and ideas. Second, freedom of expression includes the freedom to hold, receive and impart information regardless of frontiers. The arbitrary limitations established by the “Foreign Agents Act” runs contrary to these principles. The “Foreign Agents Act” further discriminates between foreign-funded NCOs which carry out “political activity” and which do not. This is a difference on the basis of political or other opinion prohibited by Article 14 of the Convention.

c. The “Foreign Agents Act” violates Article 18 of the Convention

The purpose of the “Foreign Agents Act” does not fulfill any of the legitimate grounds of restriction listed in Articles 10 and 11 of the Convention and consequently it violates Article 18 of the Convention. The assumption that states act in good faith and the proclaimed aim of interference is honest, is rebuttable by the context and effect of certain measures.²⁷ Taken together all the measures and consequences of the “Foreign Agents Act” described above, this assumption is undermined and seriously questioned.²⁸

Sincerely yours,

Márta Pardavi

Co-Chair

Hungarian Helsinki Committee, also on behalf of the Hungarian Civil Liberties Union, Transparency International Hungary, Átlátszó.hu and the Eötvös Károly Policy Institute

²⁶ Handyside v. The United Kingdom, No. 5493/72, 7 December 1976, para. 49

²⁷ Khodorkovskiy and Lebedev v. Russia, Nos. 11082/06 and 13772/05, para.899, 25 July 2013; Gusinskiy v. Russia, 70276/01, 19 May 2004, para. 76

²⁸ <https://rm.coe.int/third-party-intervention-by-the-council-of-europe-commissioner-for-hum/1680731087> para. 41