Stop Soros Law Left on the Books - The Return of the "Red Tail"?

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The Hungarian Constitutional Court ruled on 28 February 2019 that the criminalization of "facilitating illegal immigration" – introduced by the so-called Stop Soros legislative package targeting human rights NGOs – does not violate the Fundamental Law. Shocking as it may seem at first glance, the judgment seems to mitigate the effects of the law by giving it a specific interpretation largely compatible with international human rights standards. This case, however, reminds us again how difficult it is to evaluate the judgments of a constitutional court operating in an illiberal political regime.

Context

Shortly after the entry into office of the Fidesz-KDNP majority in the spring of 2018 after a third consecutive land-slide victory, the National Assembly adopted the Seventh Amendment to the Fundamental Law which inserted – *inter alia* – certain provisions in the constitutional text on the protection of national identity and the prevention of illegal immigration. Despite their strong wording and sentimental tone, these provisions carry little if any normative content. Nevertheless, it was a perfect lead-up to the introduction of the so-called Stop Soros legislative package.

One of the elements of the package was the criminalization of "facilitating illegal immigration", which extended the already existing prohibitions of the Criminal Code to all types of organizational activities not directly related to illegal immigration. The Venice Commission and the Office for Democratic Institutions and Human Rights (ODIHR) expressed serious concerns regarding this piece of legislation for its incompatibility with the freedoms of expression and association and concluded that *"the provision may result in further arbitrary restrictions to and prohibition through heavy sanctions of the indispensable work of human rights NGOs and leave migrants without essential services provided by such NGOs."* Any doubts that the political motivation behind the law was the intimidation of human rights NGOs providing assistance to asylum seekers, must have evaporated after the introduction of a special 25% tax on "immigration-supporting activities" – another legislative measure strongly criticized by the Venice Commission and ODIHR. The European Commission was not particularly happy with the Stop Soros legislative package either and initiated an infringement procedure against Hungary which entered in its second phase in January 2019. The European Court of Human Rights is currently a passive spectator of the show given the fact that the petition of certain NGOs potentially affected by the law has been found inadmissible for non-exhaustion of domestic remedies. So, this is the brief summary of the context in light of which one needs to read the decision of the Constitutional Court.

Decision

At first glance the Constitutional Court's decision on the criminalization of "facilitating illegal immigration" seems to be perfectly in line with the political will of the governing majority manifested in several legislative measures discussed above. First of all, it finds the challenged provisions compatible with the Fundamental Law despite the fact that the argument of the petitioner (Amnesty International Hungary) was supported by the opinions of the Venice Commission and ODIHR and the European Commission. The petition was rejected on every ground: lack of clarity of the law, violations of the freedoms of expression and association and the *nullum crimen* principle. Second, the justices adopted an approving tone and did not criti-

cize for a moment the legislative measures of the government. On the contrary, in para. 43 the Court acknowledges that the Seventh Amendment was a necessary response to the challenges to border protection presented by the massive and uncontrolled influx of immigrants since 2015, which in turn provided a legal basis for the enactment of the challenged provisions. In addition, the reasoning creates the impression that the law is in line with the relevant EU legislation.

And yet, it seems that the Constitutional Court's decision mitigates the most concerning potential effects of the law on human rights NGOs. Without revealing what they were doing exactly, the justices went through all the challenged provisions and gave them a restrictive interpretation. They clarified that the crime may only be committed intentionally and with the specific aim of facilitating illegal immigration. Criminal responsibility for engaging in activities in support of asylum and residence applications may only be established if the perpetrator was aware of the fact that he/she was providing assistance to a person who does not meet the definition of a refugee and is thus not eligible for protection or knew that the person's residence in Hungary would be unlawful. The decision made clear that legal representation of clients is not covered by the law.

The Court further stressed that the criminal prohibition extends to the expression of one's opinion only as far as the aim of the speech is to incite others to commit an illegal act. The participation in public debate on and dissemination of information about immigration is not prohibited. It was equally pointed out that civil society organizations have the right to pursue activities in order to defend human rights which also extends to providing assistance to asylum-seekers. The Court stated that the criminalization of charitable activities in support of vulnerable people would be contrary to the Fundamental Law. This last statement was declared a constitutional requirement stemming from the Fundamental Law and having *erga omnes* legal force.

Evaluation

While reading the judgment of the Constitutional Court I could not stop thinking about what one of my professors had told me a few years ago: "You know, Viktor, what I am really afraid of is the return of the 'red tail' in the academic literature." The "red tail" was the product of a tacit agreement between the communist political power and those scholars who were eager to produce valuable scientific contributions. In exchange for paying lip service to the Marxist ideology in their papers, researchers were granted some degree of autonomy and freedom from political interference. A practiced eye could distinguish between the ideological nonsense and the core argument of the author. Since I was born after the change of regime, my eyes did not get such training. Nonetheless, while going through the judgment I had the feeling that political jibber jabber was mixed with decent legal reasoning. Does it mean the return of the red tail, but in the jurisprudence of the Court? Or is it something else?

I wish I could give a definitive answer, but the interpretation and the evaluation of the Court's jurisprudence presents a puzzle even for those who have a much deeper knowledge of constitutional law than I do. According to the most benevolent interpretation, in this specific case the Constitutional Court tried to find a fair compromise between avoiding direct confrontation with the governing majority and offering constitutional protection to human rights NGOs. It is true that the criminal provisions raising very serious constitutional concerns were left on the books, but they seem to have been deprived of their dangerous content by the Court's interpretation. In addition, the justices explicitly stated that ordinary courts applying the criminal provisions cannot arrive at a conclusion contrary to the decision of the Constitutional Court. Such a benevolent interpretation would mean that the present decision is the manifestation of the Constitutional Court's conscience and commitment to constitutionalism. However, a rival interpretation also makes sense.

As it was briefly mentioned above, the European Commission has entered its infringement procedure

against Hungary concerning the Stop Soros legislative package in the next phase in January 2019. This decision of the Constitutional Court can save the face of the Fidesz-KDNP coalition in this situation, because it not only strengthens the government's argument that there is nothing wrong with the adopted legislation, but also shows the Constitutional Court's readiness to give a helping hand to NGOs in times of uncertainty. Making sense of the Constitutional Court's jurisprudence nowadays certainly is a puzzle, but I do not think it would be an unsolvable one. We "just" need to change our mindset. If we acknowledge that the Hungarian Constitutional Court operates in an illiberal political regime, we cannot pretend that its jurisprudence can be analyzed, interpreted and evaluated in a methodological framework applicable in well-established constitutional democracies. I believe that scholarly works focusing on judicial review in authoritarian regimes can help us develop a more sophisticated research toolkit. So let's buckle down and read more Trochev, Issacharoff, Ginsburg, Moustafa and co.

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