

Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the situation of human rights defenders

Ref.: OL HUN 1/2023
(Please use this reference in your reply)

8 December 2023

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and Special Rapporteur on the situation of human rights defenders, pursuant to Human Rights Council resolutions 52/9 and 52/4.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the **draft Bill on the Defence of National Sovereignty** in Hungary (registration nr. T/6222) (hereafter: the Bill), which is currently under consideration in the Hungarian Parliament. With this letter, we wish to address possible implications the adoption of the draft Bill in its current form could have for the enjoyment of fundamental rights in Hungary, including the right to freedom of expression and the right to freedom of peaceful assembly and of association. We express concern that the draft law appears to be a restrictive legislative measure that could negatively impact the enjoyment of fundamental rights and civic space in Hungary. We have previously expressed our views on restrictive legislative proposals in letters addressed to your Excellency's Government on 9 May 2017 (OL HUN 2/2017), 12 September 2018 (OL HUN 6/2018), and 8 March 2018 (OL HUN 1/2018).

International legal framework

Before raising specific issues in relation to the Bill, we would like to set out the international framework covering freedom of expression. Article 19 of the International Covenant on Civil and Political Rights (ICCPR)¹, provides that "*everyone shall have the right to hold opinions without interference*" and that "*everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*" This right includes not only the exchange of information that is favourable, but also that which may criticize, shock, or offend.²

Restrictions on the right to freedom of expression must be compatible with the requirements set out in article 19 (3), that is, they must be provided by law, pursue a legitimate aim, and be necessary and proportionate (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals. The State has the burden of proof to demonstrate that any such restrictions are compatible with the Covenant. The Human Rights Committee recalled that the relation between right and restriction and between norm and exception must not be reversed.

¹ Ratified by Hungary on 17 January 1974.

² See General Comment No. 34, para. 7 of the Human Rights Committee, also see para. 37 on political expression.

Article 20 (2) of the ICCPR prescribes that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law. The prohibition has a high threshold as it requires the fulfilment of three components: a) advocacy of hatred; b) advocacy which constitutes incitement and c) incitement likely to result in discrimination, hostility or violence.³

We also recall articles 21 and 22 of the ICCPR, which protect the right of everyone to freedom of peaceful assembly and freedom of association with others. As stated in a report by the Special Rapporteur on the rights to freedom of peaceful assembly and of association, States not only have a negative obligation to abstain from unduly interfering with these rights but also have a positive obligation to facilitate and protect the rights in accordance with international human rights standards.⁴ The rights to freedom of peaceful assembly and of association can only be restricted in specific circumstances: as prescribed by law to serve a legitimate purpose and the restrictions must be necessary and proportionate. In interpreting Article 22 of the ICCPR, the Human Rights Committee has confirmed that ‘the right to freedom of association relates not only to the right to form an association but also guarantees the right of such an association to freely carry out its statutory activities’.⁵ While States may have a legitimate interest in establishing reporting requirements for civil society organisations to ensure compliance with the law, these requirements ‘should not inhibit associations’ functional autonomy and operation’.⁶

Issues to be addressed

Lack of Independence of the Office for the Defence of National Sovereignty

Chapter 1 of the Bill creates the Office for the Defense of National Sovereignty (hereafter the Office). Article 1 (1) provides inter alia that the Office will be established as an *autonomous state administration body*. Article 1 (2) further provides that “*the Office shall be independent in the performance of its duties, subject only to the law, not subject to instructions from any other person or body, and shall carry out its tasks separately from those of other bodies and free from any influence by any other institution, body, political party, association, society, legal person or natural person.*” And that “*The Office’s tasks may be prescribed only by law.*” In Chapter 4 on the organization of the Office, Article 14 of the Bill provides that the President of the Office is appointed by the President of the Republic on a proposal from the Prime Minister of Hungary.

While the Bill states in Article 1 that the Office would carry out its functions autonomously and independently from political institutions, we wish to point out that the appointment of the President of the Office by the President of Hungary upon the nomination of the Prime Minister could undermine and impede the Office’s possibility to operate independently from any political faction or ideology. The Office that is tasked to ‘protect national sovereignty’ could in practice be used to protect one political or ideological faction and suppress other political views. As a result, the Office could be instrumentalized to scrutinize and suppress organizations and individuals that are critical of the Government, which would reduce the plurality of political debate and undermine democracy and civic space.

³ A/67/357, para 43

⁴ A/HRC/17/27, para 66; and A/HRC/29/25/Add.1.

⁵ Belyatsky et al. v. Belarus (CCPR/C/105/D/1296/2004).

⁶ Human Rights Council Resolution A/HRC/RES/22/6.

Overly broad and vague tasks of the Office

The tasks of the Office are defined in Chapter 2 of the Bill. Article 2 of the Bill describes the analytical, evaluative and proposing activities of the Office, including: a) developing and applying a sovereign risk assessment methodology, b) analysing the exercise of national sovereignty by evaluating information and data obtained from the entities under investigation, from state and local government bodies and from other entities or persons concerned by the case, c) developing proposals and making recommendations for measures to protect Hungary's sovereignty, d) producing an annual national sovereignty report, e) conducting and financing research to improve the social, economic, cultural, institutional and legal conditions for the exercise of national sovereignty.

Investigative functions of the Office are further defined in Article 3 and Article 6 of the Bill. Article 3 defines the investigative function of the Office to:

- “a) *detect and investigate activities carried out in the interest of another state or foreign body or organisation or natural person including:*
 - *(aa) advocacy activities, excluding activities carried out by diplomatic missions, diplomatic missions and consular posts and professional representative organisations,*
 - *(ab) information manipulation and disinformation activities,*
 - *(ac) activities aimed at influencing democratic debate and the decision-making processes of the State and society, including, in relation to persons exercising public authority, activities influencing the decision-making process of persons exercising public authority, if they could harm or threaten the sovereignty of Hungary;*
- b) *identify and investigate organisations whose activities using foreign funding may influence the outcome of elections;*
- c) *identify and investigate organisations that use foreign funding to influence the will of voters, or support such activities.”*

We note that the draft Bill uses overly broad and ambiguous terms which could open the doors to abuse of power to unduly investigate and subsequently label any organization or entity on the basis of engaging in ‘foreign-linked’ advocacy, alleged information manipulation and activities aimed at influencing democratic debate and decision-making processes. Such investigation and the possible publications could constitute undue interference with the right for freedom of expression as well as the right to freedom of association and of peaceful assembly and may lead to undue restrictions on public participation in political life and civic activities. Here we wish to reiterate that any such restrictions to these rights have to be compatible with the requirements set out in article 19 (3), 21 and 22, that is, they must be provided by law, pursue a legitimate aim, and be necessary and proportionate (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals. The stated aim of protecting the national sovereignty of Hungary does not appear to meet this threshold.

The overly broad terms describing the mandate of the Office seems to grant the Office disproportionate power to interfere in these fundamental rights. Moreover, the law appears to lack sufficient clarity and leads to legal uncertainty. The overly

broad investigative powers and the lack of legal certainty could have a chilling effect on the freedom of expression and freedom of peaceful assembly and of association, resulting in self-censorship by organizations and individuals due to the fear of investigation and possible persecution.

Extensive investigation powers and publication

Article 6 (1) further defines the investigative power of the Office, providing that the Office can investigate individual cases and that the findings of these investigations will be published on a case-by-case basis on the website of the Office. Article 6 (2) also provides that the Office will publish an annual report which includes legislation affecting national sovereignty, definition of risk indicators, recommendations to competent bodies, assessment of how recommendations have been taken into account and a summary of the Office's activities of the previous year.

Article 7 (1) provides that the Office may request information and data from the organization it is investigating. According to Article 8, the investigative competence includes to:

- a) *have access to, make copies of, and inspect or request copies of all data in the possession of the investigated entity and the state or local government body concerned in the case in question that may be relevant to the case under investigation, including documents stored on an electronic medium,*
- b) *(...) request written and oral information from the investigated organisation, from any member of the investigated organisation's staff or from the state or local government body concerned,*
- c) *(...) request written or oral information from any organisation or person that may be related to the case under investigation, and may also request a copy of any data or documents, including documents stored on an electronic medium, that may be related to the case under investigation.*

The Office's broad competence to request access to sensitive data kept by organizations subject to investigation could impede the right to privacy and that of their members, and could hamper legitimate and confidential operations of these organizations, including civil society organizations, media organizations and human rights defenders. We further wish to point out that the possibility of publicly discrediting organizations and entities that are critical of Government policies, through public 'naming and shaming' in the annual report and on the website of the Office, risks to undermine the work of civil society organizations, media organizations, political opposition and other organizations and entities that express views critical of the Government or views that, according to the Office, are linked to any foreign source or entity. These measures may lead to a chilling effect on the freedom of expression and the freedom of peaceful assembly and association and will negatively impact the plurality of debate and democracy in Hungary.

Lack of effective remedy

Article 6 (7) of the Bill excludes the possibility of an appeal against the content of a report of The Office following individual investigations. Furthermore, Article 8 (2) provides that the investigative procedure of the Office under this Chapter

shall not constitute an administrative procedure, and no administrative action may be brought in relation to its activities under this Chapter.

The Bill would prevent affected entities and organizations from appealing the outcome of investigations that concern them. This would leave organizations and entities that are subject to investigations without an effective remedy against possible infringements of their fundamental rights. This appears to contradict the right to an effective remedy for possible human rights violations in accordance with Article 2 (3) (a) ICCPR and would hamper access to justice in Hungary.

Concluding observations

In summary, we note the imminent negative implications of the adoption of the draft Bill on the Defence of National Sovereignty would have on the promotion and protection of fundamental rights in Hungary. The foreseen establishment of the Office for the Defence of National Sovereignty, would be given an overly broad and vague mandate to monitor the activities of a large variety of organizations and to assess and report on the impact of their operations on the sovereignty of Hungary, without any judicial oversight. The foreseen mandate of this Office risks to seriously undermine the right to freedom of expression and the right to peaceful assembly and association and the right to privacy, further restricting the already narrowing civic space in Hungary.

We note that this legislation seems to be part of a wider trend of legislative actions closing civic space and hampering democratic debate. In light of the observations shared in this letter, we urge your Excellency's Government to refrain from adopting the legislative proposal as currently drafted and to seek international assistance and expertise from international and regional human rights mechanisms and bodies.

As it is our responsibility, under the mandate provided to us by the Human Rights Council, to seek to clarify all matters brought to my attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned analysis of draft Bill on the Defence of National Sovereignty.
2. Please provide your observations on the steps taken to ensure the envisaged law does not unduly adversely impede the freedom of expression in Hungary in full compliance with its international obligations under Article 19 ICCPR, as well as the freedom of peaceful assembly and of association under Articles 21 and 22 of the ICCPR.
3. Please explain how the Government has ensured sufficient public consultation prior to submitting the amendments to Parliament, and how it intends to take into account international advice and expertise on the matter.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting [website](#) after

48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

We stand ready to provide Your Excellency's Government with any technical advice it may require in ensuring that national laws are fully compliant with international human rights standards.

Please accept, Excellency, the assurances of our highest consideration.

Irene Khan

Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

Mary Lawlor

Special Rapporteur on the situation of human rights defenders