

# DIRITTI COMPARATI

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## CRIMINALIZING MIGRANTS' HELPERS AND ESTABLISHING SPECIAL ADMINISTRATIVE COURTS IN HUNGARY

*Posted on 22 Giugno 2018 by [Dániel G. Szabó](#)*

After a [campaign focusing almost entirely on migration](#), Viktor Orbán won a two-thirds majority in the early April elections in Hungary. It did not take long until the new parliament adopted on 20 June a law criminalizing aid to migrants and the 7<sup>th</sup> Amendment to the Fundamental Law on several topics from freedom of assembly and constitutional identity to establishing special administrative courts. The so-called “Stop Soros” bill, named after Hungarian-American philanthropist George Soros, against migrants’ helpers reached a wide audience both in Hungary and abroad, but the debate on the proposed amendments to the country’s constitution remained mostly within constitutional lawyers. The effects of the constitutional change, however, might well be long-lasting and far reaching.

In this article, I will analyze the law’s effect on NGOs and individuals helping migrants, and one part of the proposed constitutional amendment which I believe to be the most important on the long run: the establishment of administrative courts. An unofficial English translation of an earlier version of both laws is [available here](#) (the translation was made when the bills were submitted to Parliament, the adopted text differs on

certain points).

### **Criminalizing migrants' helpers**

The law criminalizes a broad range of activities under a new crime called "Facilitation of illegal immigration", including even the distribution of information leaflets among migrants or border monitoring at the Schengen border. The law is generally very blurry and might be hard to apply. For example, it will be a crime to help in an organized way someone to get asylum status, who is not entitled for one. Of course, before the asylum procedure, it is impossible to know whether someone is entitled for protection, therefore a very broad interpretation might even mean that NGOs and even lawyers run a risk of being criminally liable if they lose the case. This would, of course, be contrary to basic fair trial rights protected by Hungarian and international law, and it is very unlikely to see such a criminal case to be successful, but the uncertainty adds up to other hardships Hungarians face by helping migrants.

Banning lawyers, NGO workers and others working on migration from the border area will be possible without a criminal conviction. Those who are under criminal procedure for the above mentioned crime may not go closer to the Schengen border by more than 8 kilometers. Hungary's southern border with Serbia, where a fence has been built to stop the inflow of migrants is an external border, therefore the new law is capable of effectively banning everyone from the border area except the police.

### **Chilling effect**

The punishment for "facilitating illegal migration" may range for up to one year's imprisonment, although it might be relieved or even lifted if "the perpetrator reveals the circumstances of the offence". The most important effect of the law, however, might not be actual criminal sentencing, but a drastic chilling effect on anyone wishing to help migrants and provide those in need with basic human rights such as a fair trial. Working on migration is already a [target of government propaganda](#),

and legal uncertainties will only add up to it. The ban of human rights workers from border zones is dangerous because human rights NGOs reported numerous cases of suspected police brutality against refugees in 2016 where a great number of people wishing to seek a refugee status arrived to Hungary from Serbia ([Human Rights Watch](#), [Jesuit Refugee Service](#)).

## **Disregarding the Venice Commission**

The Parliament adopted the law regardless of the request of Venice Commission president Gianni Buquicchio to [wait for the VC's opinion](#) to be published as soon as on 22 June, that is, two days after the vote. President Buquicchio met Hungarian foreign minister Péter Szijjártó on 18 June. An investigation of the "Stop Soros" bill is ongoing and a draft opinion has already been sent to the Hungarian authorities, but was not shared with the public.

A 25% tax on the income of NGOs working with migrants was part of an earlier version of the "Stop Soros" bill, but was not adopted now. Instead, the government [submitted](#) it to Parliament as a separate bill. As of now, one aspect of the earlier version of the law is off the table: a previous version of the package would have established a [licensing system](#) where an NGO could only work on migration if the Minister of Interior consented.

Under the recently adopted law, it is possible to hold NGOs (and not only individuals) criminally liable. The law allows for monetary sanctions, the limitation of the activities or the termination of a legal person used to commit a crime. These measures, however, are possible only after a lengthy procedure.

The law as it stands now and was analysed above (the new criminal law adopted, but the 25 % tax not yet adopted), poses a risk to individual NGO workers, but might be hard to enforce. It might have a high political price to arrest lawyers and NGO workers and send police against activists distributing leaflets or simply watching the border police. Speaking strictly

on a legal level, the Hungarian Constitutional Court or the European Court of Human Rights (ECtHR) will most likely be able to sort out contradictions and overly restrictive interpretations of the law. The uncertainty and the chilling effect caused by it will, nevertheless, stay and harden life for NGOs. The most important effect of the law will be the diminishing of solidarity with migrants within the society, as individuals or small NGOs will not have the legal expertise or the willingness and money to fight lengthy criminal procedures even if they have a serious chance of winning at the end.

### **Establishing the Administrative High Court**

The government's aim to amend the Fundamental Law would add some conditionality to liberties and include political statements to the text, but most importantly, serious structural changes are also foreseen. Currently there is one single top court in Hungary, the Curia, the supreme judicial organ of regular courts (Hungary has a Constitutional Court for constitutional adjudication). The amendment establishes the parallel Administrative High Court, a new supreme court for administrative cases with the same powers as the Curia, therefore it would have the power to issue so-called "uniformity decisions" on diverging lower court practice which is binding for all courts (it is currently a power vested solely in the Curia).

The proposed changes to establish a new administrative judicial branch caused serious uneasiness among professionals as it might hamper judicial independence. There are signs of political aims in establishing the new administrative courts and even revenge for some decisions of the Curia. The fear of many is that the new court will be filled with loyal judges friendly to the government to rule on a wide range of politically sensitive cases.

### **"Not up to its task intellectually"**

During the elections campaign, the administrative branch of the Curia

issued some judgements unfavorable to the ruling Fidesz party, such as [invalidating](#) 4360 votes sent via post by voters living abroad, because they did not arrived in the high security envelopes designated for election documentation. The decision resulted in a loss of one seat in Parliament for Fidesz. A constitutional complaint turned out to be unsuccessful and Orbán consequently [criticized](#) the Curia vehemently: "I think the Curia has taken away one mandate from our voters with this decision. The Curia has clearly and seriously interfered with the election. After reading the decision of the Constitutional Court, it is obvious that *the Curia was not up to its task intellectually.*"

The single biggest threat is that the new Administrative High Court and the lower level administrative courts will be filled with new judges loyal to the governing parties. The president of the Administrative High Court will be elected by Parliament, which is dominated by Orbán's *Fidesz* party with a track record of filling independent institutions with loyal allies. In [Baka v. Hungary](#), the ECtHR ruled that the dismissal in 2012 of the president of the Supreme Court, three and a half years before the end of his tenure, was unlawful and the dismissal was a retribution for Baka speaking out against new laws weakening judicial independence. In 2017 (after the unsuccessful attempt of the government to establish the Administrative High Court) a ministerial decree [increased the chance](#) of former public servants to be appointed for judges by allocating more points to such a practice in the strict evaluation process. Based on this experience, there is a real threat that judges loyal to the government will be appointed to the new administrative courts.

Highly politicized cases would fell within the jurisdiction of the administrative courts. The governing coalition already tried to establish the Administrative High Court in 2016 but lacked the necessary two-thirds majority in Parliament, the Constitutional Court therefore [invalidated](#) the provisions on the specialized court. From this attempt it is possible to grasp what would fell within the jurisdiction of the administrative courts. Overseeing the legality of various permits, decisions on taxation and public procurement, as well as complaints against police misconduct and asylum cases would of course be dealt with by the administrative courts,

but electoral issues or freedom of information requests might also fall within the ambit of the new court system.

A serious difference between the 2016 and the current attempt is that two years ago the government intended to put the separate administrative judiciary under the Curia, therefore the Court system would not have become "two-headed". The government did not publicly argued why a shift in this plan is necessary and [some fear](#) that it is a revenge on the Curia for being too independent recently.

On other issues concerning the independence of the Hungarian judiciary I suggest you to read this very thorough [analysis](#) of the amendment and context by the Hungarian Helsinki Committee and [this article](#) on Verfassungsblog.

## Summary

Both laws analysed above has political aims: the Stop Soros package is used to show effectiveness and the fulfillment of the governments promise to fight against migration, while the 7<sup>th</sup> Amendment to establish administrative courts would lessen the checks on government will. The parallel running of the two laws with numerous other issues might be aimed at creating a fog of threats, where one cannot see what is important and what is not.

The "Stop Soros" law creates further hardships for individuals and NGOs working with asylum-seekers, not to speak of the prospect of the 25 % tax. The amendment to establish a new branch of administrative courts might have very serious and long-lasting effects. The Hungarian judiciary has important deficiencies, but it reserved significant portions of independence and in many cases it is still a real check on the government's will and a protector of freedom. With this attempt to tame the courts in politically sensitive cases, Hungary might lose important domestic remedies, and international forums, such as the ECtHR, will become even more important.