Hungarian Ban Of Totalitarian Symbols: The Constitutional Court Speaks Up Again

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Although the Hungarian government promised not to strike back after the Constitutional Court's finding the constitutional amendment on the voters' registry unconstitutional, more recently it became clear that the Court will face a more comprehensive response than an occasional constitutional amendment overturning its recent decisions.

The constitutional amendment tabled by the government in early February 2013 (T/9929) will essentially restore the invalidated Transitional Provisions into the core text of the Fundamental Law. Among the restored provisions the lengthy segment of the former Transitional Provisions on "Transition from Communist Dictatorship to Democracy" is inserted in the "Foundation" section of Fundamental Law as future Article U. In addition, the new constitutional amendment includes adjustments to the procedure and power of constitutional review. It also brings a prohibition on interpreting the articles of the Fundamental Law with reference to the decisions of the Constitutional Court under the previous Constitution, thus, hoping to remove 20 years of constitutional jurisprudence from the record of Hungarian constitutionalism.

While awaiting the finalization of the amendment, apparently, the Constitutional Court is not intending to lay low. Instead, it just handed down a decision on a constitutional complaint by Mr. Vajnai, a political actor who is famous Europe-wide for his efforts to wear the red star in public. It was upon his claim that the European Court of Human Rights found the application of the Hungarian criminal ban on select totalitarian symbols unconstitutional in *Vajnai v Hungary* in 2008. Article 269/B of the Criminal Code prohibits, inter alia, the public display of 'a swastika, an SS-badge, an arrow-cross, a symbol of the sickle and hammer or a red star, or a symbol depicting any of them.' According to the ECtHR the application of the criminal ban was an indiscriminately broad limitation of freedom of expression (Article 10), as it applied to any display of the red star in a blanket fashion, and not only to the ones that amounted to totalitarian propaganda.

In its face it does not appear too surprising that in its decision of February 19, 2013 (IV/2478/2012) the Hungarian Constitutional Court found the criminal ban on all totalitarian symbols unconstitutional. In the 10 to 5 decision Chief Justice Paczolay joined the dissenters. The Constitutional Court found that the criminal prohibition was defined too vaguely, and also noted that jurisprudence of criminal courts applying this provision was contradictory. As a result, the Court found that the criminal ban violated the constitutional requirements of criminal law in a rule of law state (Article B(1)), and also infringed freedom of expression (Article IX (1)). The reasoning of the Court is heavy with references to ECtHR jurisprudence, and also to examples on bans of totalitarian symbols (or the lack thereof), in various European democracies. The majority did not miss this opportunity to note that the Polish Constitutional Tribunal gave effect to the ECtHR's *Vajnai* judgment already in 2011 (see K 11/10 of July 19, 2011).

Although the Court emphasized that the jurisprudence of the ECtHR provides guidance for interpreting the fundamental rights provisions of the Fundamental Law, in effect the majority's reasoning is not phrased in terms of the protection of freedom of speech, as a fundamental right. Instead, the majority provided reasons almost exclusively composed of formal concerns on the requirements of the rule of law in a criminal justice setting. The differences between the two approaches are demonstrated by Justice Bragy-

ova's concurring opinion who found a violation on free speech grounds in the case.

The constitutional justices disagreed about the remedy in the case. Chief Justice Paczolay dissented as in his reading the Court should have invalidate the criminal ban from the time of its entry into force and not only for the future. Justice Kiss in his concurring opinion suggested that the Court should have established a constitutional requirement in the case, i.e. that the display of totalitarian symbols may only criminalized if they are used in connection with spreading a totalitarian ideology.

At first it might seem that the Hungarian Constitutional Court simply followed suit in a case where very little was at stake. A closer look, however, adds important layers to this otherwise numb story. To begin with, the decision of the ECtHR in *Vajnai v Hungary* was in clear contrast with the earlier position of the Constitutional Court upholding the criminal ban on totalitarian symbols (Decision 14/2000 (V. 12.) AB). In its earlier decision the Constitutional Court submitted that "the historical experience of Hungary and the danger to the constitutional values threatening Hungarian society reflected in the potential publicly to demonstrate activities based on the ideologies of former regimes, convincingly, objectively and reasonably justify the prohibition of such activities and the use of the criminal law to combat them."

The problem escalated, when Hungarian criminal courts as well as the Supreme Court, refused to follow the ECtHR decision in *Vajnai v Hungary*, and insisted on applying the Article 268/B of the Criminal Code in the exact same fashion which was found unacceptable by the ECtHR. One of these cases reached the ECtHR in *Fratanoló v Hungary*. The ECtHR reiterated that "a restriction on the display of that symbol to be justified, it was required that there was a real and present danger of any political movement or party restoring the Communist dictatorship, [adding] that even the potential propagation of Communist ideology could not be the sole reason to limit the display of the red star by way of a criminal sanction" (para 25).

The *Fratanoló* judgment became a subject of political fascination in Hungary, when the Ministry of Justice and Public Administration announced in parliament that Hungary will not comply with the ECtHR's words and refuses to pay up. While over a dozen human rights organizations urged the government to comply with the judgment of the ECtHR, the secretary of state for the Ministry submitted in parliament that "We believe that as a part of Hungary's sovereignty it can decide what triggers fear, what triggers terror in Hungarian citizens." (June 11, 2012, Day no. 200, Speech no. 324). Supporting the position of the government, the chair of the parliamentary committee for human rights submitted that it was the task of parliament to defend a Hungarian court against the ECtHR (June 11, 2012, Day no. 200, Speech no. 328). Thus, the discretion of the sovereign was again invoked to justify an apparent violation of fundamental rights.

Reading the Constitutional Court's recent decision against this background it is hard not to see it as a reinforcement of the justice's efforts to belong among Europe's finest courts even, in the face of repeated humiliation from the government. The majority refused to see *res iudicata* in the case, finding that the judgment of the ECtHR in the *Vajnai* case presents a "legally significant circumstance and perspective" which necessitates the revisiting of the Constitutional Court's previous decision. This is a major change after 4 years of silence on the matter. And the Court broke its silence in the face of clear disapproval from the government with reference to the source which the sovereign was seeking to extinguish.

The decision on totalitarian symbols is not only a declaration of allegiance, it is also a signal to parliament and the government on the Constitutional Court's commitments in the face of impending constitutional amendments which seek to diminish the significance of constitutional review in Hungary. Note that the majority invalidated the criminal ban on a highly formal ground (ie. vagueness and the rule of law in criminal matters), and the justices in the majority did not enter a substantive discussion on the feelings of victims of Hungary's oppressive regimes. Whether the lack of historical reflection will become a fatal weakness of the decision with the insertion of the long

section on the condemnation of the communist regime still needs to be seen. Till then the near future holds surprises about pending cases in the docket, the fate of which might be fundamentally altered by the entry into force of the most recent round of constitutional amendments reinstalling constitutional provisions which were removed by the Court less than two months before.

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