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As Good as It Gets

Party Bans and Democratic Militancy

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Contrasting the constitutional limitations on the freedom to establish political parties in Italy and Germany brings out two quite different conceptions of militant democracy: one is particularistic, retrospective, and provisional – preoccupied with the transition to democracy; the other is universalistic, prospective, and enduring – concerned with the degeneration of democracy. The Portuguese Constitution, true to its eclectic character and multiple influences, steers a seemingly middle course between these polar options.

Between retrospective and prospective militancy

The first paragraph of Section XII of the Transitional and Final Provisions of the Constitution of the Italian Republic provides that "[i]t shall be forbidden to reorganise, under any form whatsoever, the dissolved Fascist party". Article 21(2) of the Basic Law of the Federal Republic of Germany provides that "[p]arties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional".

Under the first, constitutional democracy curtails the freedom to establish a political party whose very purpose is to revert the course of political transition and restore the old regime; the ban is meant to prevent a return to the status quo ante. As if behind a veil of ignorance, under the second, a constitutional ban on political parties is meant to address the democratic iteration of the paradox of tolerance: it is self-defeating to bestow democratic legitimacy upon those committed to destroying or abolishing democracy. This is not to deny that the motivation for the German provision was intensely shaped by the traumatic memory of the collapse of the Weimar Republic – an experience, in any case, not of failed transition, but of institutional degeneration. It is simply to note that, unlike its Italian counterpart, the provision in the Grundgesetz is not a temporary expedient targeting a particular object, but a lasting feature of the constitutional order.

Article 46(4) of the Portuguese Constitution provides that "[a]rmed, as well as military, militarised, or paramilitary associations, and organisations that are racist or endorse fascist ideology, are not permitted". Although the provision was included in the original version of the Constitution, enacted in 1976, it was amended in 1997 to include racist organisations. There are two obvious differences between the Portuguese and the German regimes. First, the former targets "associations and organisations", which is why it is inserted in the article of the Constitution concerning freedom of association, while the latter contains two separate provisions, the previously mentioned Article 21(2), concerning political parties, and Article 9(2), which prohibits associations "whose aims or activities contravene the criminal laws or that are directed against the constitutional order or the concept of international understanding". Apart from not having an identical scope (the requirements to ban a political party are notoriously narrower and stringer), the prohibitions on parties and associations are, under German law, subject to different procedures: according to Article 21(4), a political party can only be banned by the Federal Constitutional Court, at the request of one or more of the three constitutional bodies mentioned in § 43 of the Federal Constitutional Court Act, whereas ordinary law provides that an unconstitutional association can be dissolved by the minister of the interior of either a regional or the federal executive. Under Portuguese law, on the other hand, the

single constitutional prohibition on some varieties of association and organisation is administered by the Constitutional Court according to a special procedure regulated by ordinary law.

The second difference between the two regimes is more interesting. The German ban is on parties seeking to undermine or abolish constitutional democracy (the "free democratic basic order"), an exceedingly abstract and contested concept. The Portuguese provision targets particular classes of association ("armed", "military", "militarised", and "paramilitary") and organisation ("racist" and "fascist"). This may seem to place it closer to the Italian regime. However, upon closer inspection, that is not exactly the case, for the prohibition does not target a particular object ("the dissolved Fascist party"), but types of object, albeit less general than that of associations seeking to undermine constitutional democracy. Indeed, the type "associations endorsing fascist ideology", which stands out in the Portuguese provision, poses significant complications of its own. While it is clear that it is not co-extensive with the German ban, it can be read either very narrowly, as referring specifically to organisations seeking to restore the previous regime (referred to as "the fascist regime" in the Preamble to the Constitution) – in which case it would serve a function similar to that of the Italian provision –, or very broadly, along the lines of "fascism" as a political buzzword and term of abuse (recall that the Comintern official line in the 1930s was that social democracy was "socio-fascism", and there is a long list of newly anointed neologisms employing the damning F-word: "neofascism", "islamofascism", "postfascism", "neoliberal fascism", and so on).

The constitutional prohibition on fascist organisations is regulated by a statute of 1978 [Lei n.º 64/78, de 6 de Outubro] which, apart from attempting a definition of the term "organisation" (a challenge addressed rather mediocrely, for on its own terms the law appears to proscribe – embarrassingly and problematically – a reading group devoted to fascist literature or an association of self-proclaimed fascist hunters of wild boar), contains in Article 3(1) an explanation of what it is to endorse fascist ideology: "adopting, defending, seeking to spread and effectively spreading the values, principles, exponents, institutions, and methods characteristic of fascist regimes in recorded history, namely bellicism, violence as a means of political struggle, colonialism, racism, corporatism, or the exaltation of the most representative personalities of those regimes". This laundry list is not particularly useful, and the following provision, which aims to supplement a modicum of concreteness, rambles on, referring to "organisations that deploy antidemocratic means, namely violence, against the constitutional order, democratic institutions, and the symbols of sovereignty, or endorse and disseminate ideas or adopt forms of struggle incompatible with national unity". In the only case in which the Constitutional Court was asked to rule on a request to ban an organisation for endorsing fascist ideology [Acórdão n.º 17/94], the judges struggled to cash out these provisions, and dodged the bullet by arguing that, since the organisation at issue had been dissolved in the meantime, it was unnecessary to rule on the merits.

That this old statute has never been effectively applied and was never reformed is symptomatic of the fact that the law in action ascribes to it a largely symbolic role as a condemnation of the old regime. That is neither surprising nor worrisome. There are ominous affinities between old-school fascism and some of the contemporary populist movements on the far right of the political spectrum that have grown at an alarming speed in many of the most consolidated constitutional democracies in the world, defying once widely practised norms of civility, assaulting once widely championed liberal values, and questioning once widely accepted representative institutions. But such affinities are typically neither straightforward nor overwhelming, much less are they explicitly embraced by leaders and adherents. Therefore, a ban on fascist organisations, along the lines pursued by the constitutional and statutory provisions nominally in force in Portugal, is unlikely to be any more useful as a means to protect constitutional democracies against current threats of internal dissolution than a ban on royalist organisations seeking to restore absolute monarchy would have been, a century ago, to prevent the rise of

fascism. Proper avenues of democratic self-defence have to be sought elsewhere.

The dilemma of passiveness and partisanship

In this regard, the German ban on parties seeking to undermine or abolish "the free democratic basic order" appears to be considerably more promising. But appearances can be deceptive. There is no doubt that constitutional democracy is not a value-neutral procedure designed to channel the will of the people uncritically, conceived as a formless and primaeval political potency – a regime inherently deprived of the moral resources to judge the content or control the outcomes of politics. It is not neutral, for starters, with respect to the procedure itself, notably universal suffrage, parliamentary representation, loyal opposition, political accountability, and so on; the will of the people does not exist before and beyond this framework, but only as something that expresses itself through or under it. The framework itself is grounded in the substantive value of free and equal persons, from which other essential components of constitutional democracy, such as fundamental rights, the rule of law, and the separation of powers, can be derived with greater or lesser difficulty. Accordingly, there is nothing paradoxical about denying democratic legitimacy to those who seek democratic power to undermine constitutional democracy itself; on the contrary, the paradox is to bestow democratic legitimacy upon the enemies of constitutional democracy. In light of this, it is hard to resist thinking that the prohibition of anti-constitutional political parties – those committed to abolishing the constitutional order – is merely a logical consequence of the value-laden nature of the regime.

Yet it is not that simple. The prohibition has to be applied by someone, and that someone can use it not to defend democracy from its enemies but to silence democratic opposition. The main reason to entrust this role to the Federal Constitutional Court is precisely that an independent body removed from the ordinary political fray is less likely to abuse it. Alas, that is not the end of the story. The problem is greatly aggravated by the fact that the standards relevant to judging whether a party operates within or against democracy are ineradicably abstract and contested. The second-order question of where to draw the line between legitimate criticism of the constitutional system and seeking to overthrow its very foundations is itself subject to ongoing and interminable democratic controversy. Some lines can perhaps be drawn without substantial controversy (although I write this with trepidation): a party seeking to abolish free and open elections or to strip citizens in minority groups of their nationality is anti-constitutional; a party seeking to substitute a hereditary monarch for the office of a ceremonial president or expanding the scope of federal power to the detriment of "state's rights" is arguing constitutional politics. But what about a libertarian party seeking to suppress the social character of the state? Or a communist party vouching for the abolition of the right to private property? Or a populist party advocating the reintroduction of the death penalty? Or a nationalist party committed to an ethnically motivated immigration policy? There is reasonable democratic controversy about whether proposals such as these are reasonably democratic, and there is no Archimedean point above the cacophony of political debate from where the dispute can be objectively settled. It is controversy all the way down.

Undoubtedly conscious of the dilemma between passiveness and partisanship, the recent case law of the Federal Constitutional Court on the criteria to ban a political party under Article 21(2) of the Basic Law is a studious exercise in the art of judicial tiptoeing [BVerfGE 144, 20 – NPD-Verbot II]. Arguing that the measure is both the "sharpest" weapon against "organised enemies" of constitutional democracy and a "double-edged" one – an implicit acknowledgement of the dilemma –, the Court reasons that the concept of the "free democratic basic order" comprises solely "those central fundamental principles which are absolutely indispensable for the free constitutional order"; these are the majestic generalities of human dignity, democratic legitimacy, and the rule of law. Moreover, a party can only be banned if it "actively seeks" to undermine or abolish the constitutional order, and that requires conclusive evidence of planned action with at least the prospect of success. The bar is under-

standably set very high, rendering the prohibition largely ineffective against the most threatening form of democratic decay in our societies: the gradual rotting away of constitutional institutions instigated by unscrupulous agents and skilled demagogues operating in a toxic atmosphere of political alienation, shrillness, and anxiety. The only suitable remedy against this cultural malaise is what John Stuart Mill once called "a strong barrier of moral conviction" – intellectual militancy by concerned citizens in the public sphere, instead of institutional militancy by government officials in the courtroom. In the end, the fate of constitutional democracy is in the hands of ordinary people, not engraved on some perfectly contrived juridical formula. I am afraid this is as good as it gets.

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