

Can a Two-Tailed Dog Be Allowed Into the Polling Booth?

The Case of Magyar Kétfarkú Kutya Párt Versus Hungary Before the ECtHR

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Abstract

The Hungarian satirical Two-Tailed Dog Party (Magyar Kétfarkú Kutya Párt – MKKP) applied to the ECtHR as a result of the decisions rendered by the Hungarian National Electoral Commission, the Curia of Hungary and the Constitutional Court, who ruled that a mobile application developed by the party allowing anonymous users to share their invalid votes violated Hungarian election law. By 16 votes to 1, the Grand Chamber of the ECtHR ruled that the Hungarian authorities had violated the Article of the ECHR on freedom of expression. According to the ECtHR's reasoning, the severe uncertainties about the possible consequences of the legal provisions applied by the domestic authorities went beyond what is permissible under Article 10(2) ECHR. The ECtHR has ruled that a judicial interpretation of a law's rules does not inherently violate the requirement that laws be written in such a way that the legal implications are predictable. However, since the national law in this case provided for a case-by-case limitation on the expression of an opinion on voting, electoral bodies and national courts that interpreted and enforced these rules enjoyed an excessive amount of discretion. In conclusion, the ECtHR found that legislation restricting freedom of expression must be treated more strictly in connection with electoral procedures: it must not be in any way misleading or inconsistent.

Keywords: freedom of speech, elections, ECtHR, democracy, secrecy of votes.

1. The Facts of the Case

Hungary held a referendum on the EU's migrant relocation scheme on 2 October 2016. During the referendum campaign, several opposition parties had called on voters to vote in such a way that their ballots would be invalidated to protest of the referendum. The Hungarian Two-Tailed Dog Party (*Magyar Kétfarkú Kutya Párt*, MKKP), a registered political party that did not meet the

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legislative threshold for parliamentary representation and expresses its political views primarily through satire and satirical material, considered the referendum initiative misleading and disrespectful of direct democracy mechanisms. In order to express its political opinion, the applicant party had made a mobile phone application called ‘the cast-an-invalid-vote app’ available to voters, where they could upload and exchange photos of their ballots with the public, as well as add suggestions about why they cast their ballots in the way they did. Users could upload and exchange photos anonymously, which was one of the app’s key features. Because of the application’s hashing technique, neither MKKP nor the developer could access the users’ personal information. A total of 3,894 images were posted on the day of the referendum.

A private citizen filed a complaint about the application with Hungary’s National Election Commission on 29 September 2016. According to the Commission,¹ the application of MKKP had violated the rules of electoral fairness, voting confidentiality, and the proper exercise of rights. In the eyes of the public, the application had the potential to discredit the role of electoral bodies and tallying systems, according to the Commission. The Commission issued a cease-and-desist notice to the respondent political party. It concluded, among other items, that photographing ballot papers may have resulted in election fraud. The use of the mobile application, according to the Commission, violated the principles of election fairness, voting confidentiality, and exercising rights in accordance with their purpose, in violation of Hungary’s Fundamental Law and the National Election Procedure Act.²

The applicant then petitioned the Curia of Hungary (*Kúria*) for judicial review of the ruling. The Curia of Hungary upheld the Commission’s ruling on the violation of the principle of the proper exercise of rights on 10 October 2016.³ It was determined that a ban on photos and publishing would not infringe on voters’ freedom of speech because they were free to express their views by voting and sharing how they voted with others.⁴ The remainder of the Commission’s decision on election confidentiality and discrediting the role of electoral bodies was reversed by the Curia of Hungary. The conventional approach to the role and use of paper ballots in a voting system was central to the Curia of Hungary’s case for considering a breach of this principle (*i.e.* only for the purposes of casting a secret vote). Sharing the results of the vote verbally, in writing, or on social media, according to the Curia of Hungary, was in line with the intended purpose of paper ballots. However, taking and sharing a picture of a paper ballot *via* a mobile application to express a political opinion was incompatible with this traditional position.⁵ According to the Curia of Hungary,

1 118/2016. NVB decision.

2 *Id.*

3 Case No. Kvk.VI.37.942/2016/2.

4 *Id.* para. 16.

5 *Id.* para. 25.

“The conduct that calls on voters to photograph and publish the ballot paper of the national referendum through an application created for this purpose is contrary to the principle of the right to vote.”⁶

MKKP filed a complaint with Hungary’s Constitutional Court, alleging that their constitutional right to freedom of speech had been violated. The Constitutional Court rejected the constitutional complaint, arguing that the petitioner had only created the medium, the surface where these opinions could appear, but that in itself does not mean that the petitioner himself expressed an opinion.⁷ The Constitutional Court shared the Curia of Hungary’s view that the case concerns the freedom of expression of voters, however, according to the Constitutional Court, this does not mean that the petitioner’s right to express an opinion was also the subject of court proceedings.⁸ The petitioner therefore referred only to an indirect violation of his freedom of expression, namely that the alleged restriction of the freedom of expression of voters also infringed his freedom of expression. Thus, the Constitutional Court rejected the petitioner’s request that its activities would fall within the scope of freedom of expression.⁹ Following these domestic procedures, MKKP filed a complaint with the ECtHR.

2. The Judgments of the ECtHR

The case was initially assigned to the ECtHR’s Fourth Section. The Chamber found that punishing MKKP for offering a means of dissemination from which others would impart and obtain information infringed MKKP’s right to freedom of speech under Article 10 ECHR. Furthermore, the Chamber found that the Government of Hungary violated the invoked right by failing to specify which interest the ban served under Article 10(2). As a result, the Chamber unanimously decided that the intervention could not be deemed to be pursuing a valid goal under Article 10(2) ECHR, and thus that Article 10 ECHR had been violated. The ECtHR cited the Grand Chamber’s *Öztürk* case,¹⁰ emphasizing that freedom of speech requires the freedom to transmit information, as any limitation on these media inevitably interferes with the right to communicate and learn information. *The Hungarian Government*, according to the Chamber, was *unable to identify a valid goal* recognized by the ECHR in relation to Article 10 that would have justified limiting the MKKP’s right to express an opinion. In light of the finding of a breach of the ECHR, the Chamber decided not to look into the merits of the legislation because the MKKP’s domestic conviction was plainly

6 Id. para. 28.

7 Decision No. 3226/2016. (XI. 14.) AB.

8 Id. Reasoning [26].

9 Id. Reasoning [29].

10 *Öztürk v Turkey (GC)*, No. 22479/93, 28 September 1999.

wrongful enough.¹¹ Following the decision of the Chamber, the Hungarian government requested the referral of the case to the Grand Chamber.¹²

The Grand Chamber stated that the MKKP had been penalized for providing a means of transmission enabling others to impart and receive information. It considered that providing a forum for others to express their opinions in the form of posting ballot photographs constituted conduct in the exercise of the MKKP's right to freedom of expression.¹³ It also underlined, that the parties agree that the domestic authorities' actions infringed on the MKKP's right to freedom of speech.¹⁴

The Grand Chamber considered the Government's preliminary claim that the claimant had not exhausted all domestic remedies, since the MKKP should have asked the Constitutional Court to find the applied legislation unconstitutional within the scope of normative regulation instead of referring to the unconstitutional judgment. The Grand Chamber rejected this point, holding that the applicants' political communication was restricted by the *incorrect application of standards, since these allowed for an overly broad leeway in the case*. As a result, the MKKP filed a 'genuine' constitutional complaint (stating that the judgment of the Curia of Hungary was unconstitutional), which can be used to address those issues. As a result, in this regard the Government's argument was rejected by the Grand Chamber.¹⁵

The Grand Chamber found that the smartphone application was created to allow users to share their comments and photographs using information technology in the case at hand. The Grand Chamber judgment went into great detail on whether MKKP's right to freedom of speech had been restricted and whether the intervention was legal. The ECtHR stated that the existence of an interference with MKKP's freedom of speech was not disputed by the parties and was further confirmed by the Grand Chamber.¹⁶ It then went on to say that in the present case, the cell phone application has a communicative meaning and therefore constitutes speech on a matter of public concern, as covered by Article 10 ECHR. Furthermore, the Grand Chamber was satisfied that what the applicant political party was condemned for in this case was precisely the provision of means of transmission for others to impart and receive information, as specified by Article 10 ECHR.¹⁷ According to the ECtHR, *the use of the application was an expression of political speech and a conscious activity of citizens*.¹⁸

The Grand Chamber then had to decide whether the intervention was justified under Article 10 ECHR, that is, whether it was (i) prescribed by law; (ii) served a legitimate aim; and (iii) was necessary in a democratic society. The

11 *Magyar Kétfarkú Kutya Párt v Hungary*, No. 201/17, 23 January 2018. The case was decided by the Fourth Section of the ECtHR.

12 *Magyar Kétfarkú Kutya Párt v Hungary (GC)*, No. 201/17, 20 January 2020, para. 65.

13 *Id.* para. 66.

14 *Id.* para. 85.

15 *Id.* para. 89.

16 *Id.* para. 85.

17 *Id.* para. 87.

18 *Id.* para. 74.

ECtHR ruled that it is not up to them to express a view on the appropriateness of the methods chosen by the legislature, but to determine whether the application of it to the claimant was in violation of the ECHR.¹⁹ In determining whether the fine had a legitimate goal, the Grand Chamber looked first at the Government's claim that the fine was intended to ensure the orderly operation of the voting process and the correct use of ballot papers. The Government had refused to show any other real rights of 'others' that may have been harmed by the anonymous publishing of imagery of marked or spoiled ballots, according to the ECtHR. Furthermore, they did not demonstrate any resulting defect in the voting process that would make a restriction of the application's use necessary. The Grand Chamber emphasized that the phrase prescribed by law in the second paragraph of Article 10 not only includes the presence of a legal basis in domestic law, but also establishes standards for the quality of law.²⁰ The ECtHR provided a comprehensive review of this last point. The Grand Chamber's evaluation began with the premise that the concept of legal quality necessitates, as a corollary of the foreseeability test, that the legislation be consistent with the rule of law; this means that adequate protections against arbitrary intervention by public authorities must exist in domestic law.

The key problem in this case, according to the Grand Chamber, was *whether the legal justification for interfering with MKKP's freedom of speech was adequately foreseen*, and therefore whether the interference was 'prescribed by law'. Or in other words, whether the MKKP *could be expected to anticipate under the law that publishing an application for sharing anonymous images would breach the Electoral Procedure Act*.²¹ The Grand Chamber stated in this regard that neither the National Election Commission nor the Curia of Hungary agreed on the relevant principles.²²

The ECtHR believes that a situation requiring judicial interpretation of legally enacted standards would not necessarily violate the requirement that the law be framed in sufficiently specific terms. The fact remains, however, that the domestic regulatory structure used in this case allowed for a case-by-case restriction of voting-related expressive behavior, giving electoral bodies and domestic courts broad latitude in interpreting and applying the rules.²³ In light of this, the Grand Chamber concluded that the legislation gave electoral bodies an especially broad margin of discretion in interpreting the legal obligation of good faith and proper exercise of rights. Simultaneously, predictability is particularly relevant when the state limits a political party's activity in connection with an election or referendum.²⁴

The decision was accompanied by a dissenting opinion from Russian Judge Dimitry Dedov, who believes that an application that encourages the casting of an

19 Id. para. 96.

20 Id. para. 93.

21 Id. para. 102.

22 Id. paras. 105-107.

23 Id. para. 111.

24 Id. paras. 113-114.

invalid vote is an act of contempt for the referendum. According to the judge, the applicant should have predicted the authorities' reaction in this case.

3. Comments

The central question in this case is whether the MKKP knew or should have known that its actions would violate the existing electoral rules in the absence of a binding provision of domestic legislation explicitly regulating the taking of ballot photographs and anonymously uploading those photographs to a mobile application for dissemination while voting was in progress.

The current case was the first where national authorities applied the concept of the fair exercise of the right to photograph and share ballot papers. Although the interpretation of the law was predictable in and of itself, the predictability of the law is especially relevant when a political party's freedom of speech is limited during elections or referendums, according to the ECtHR.

The Grand Chamber used this opportunity to directly incorporate two innovative elements presented by this case into the ECtHR's case-law: (i) the publishing of ballot images, and (ii) the operation of a smartphone application allowing voters to upload a picture of their invalid ballot papers. Indeed, the ECtHR confirmed that a photograph of a ballot paper comes under the freedom of expression protection related to photograph publishing.²⁵

The ECtHR made it clear that the fact that this case happened during election season and involved a political party played a significant role in the decision. While these clarifications seem helpful, it is unfortunate that the Grand Chamber failed to mention that political parties that operate a mobile application are not only protected by freedom of speech, but also have a duty to ensure that contact through the mobile application is respectful towards the referendums, which are important democratic mechanisms. Given that this was the ECtHR's first time dealing with this type of problem, a more balanced general approach would have been preferable. The Grand Chamber described the incitement to vote as invalid, and the questioning of the seriousness of the referendum as an expression of opinion.

Following this judgment, it's unclear whether the Grand Chamber would have reached a different conclusion if the foreseeability of the legal basis limiting a political party's freedom of speech had not been a primary concern. Indeed, had the case not been about elections or had the applicable provisions been more elaborate, the duties of the mobile application would have been set forth in more detail in the reasoning judgment.

The ECtHR ruled that a judicial interpretation of a law does not inherently violate the requirement that laws be written in such a way that the legal implications are predictable. However, since the national law in this case provided for a case-by-case restriction on the expression of an opinion on voting, the

25 The Grand Chamber cited *Von Hannover v Germany (No. 2.) (GC)*, No. 40660/08 and 60641/08, 7 February 2012, para. 103; and *Ashby Donald and others v France*, No. 36769/08, 10 January 2013, para. 34. See *Id.* para. 86.

electoral bodies and national courts that interpreted and enforced it had an excessive amount of discretion. The ECtHR claims that differing interpretations of the Electoral Procedure Act, as well as national authorities' and courts' exclusive interpretation powers have increased the threat to freedom of speech. Unfortunately, it impossible to draw far-reaching conclusions from the ECtHR's judgment for future cases, as a really specific decision was made here. Therefore, we do not know how to classify a mobile application with other functions or photos taken in different contexts in polling booths.

As the dissenting opinion points out, the case also highlights concerns surrounding political campaigns on election day, with the goal of actively influencing voter opinion, as well as potential disdain for the democratic institution of a referendum through the use of invalid votes. As Judge Dedov wrote

“the MKKP sought to influence voters to invalidate their ballot papers. This is not a case about punishment for taking ballot photographs, [...] it is a case about showing disrespect for the democratic decision-making process.”²⁶

I have to agree with the above, because the essence of the matter was not the issue of taking photographs of ballot papers, but the assessment of whether democratic processes were influenced this way. Unfortunately, however, the Grand Chamber judgment did not deal with this issue in sufficient detail, which, in my opinion, leaves an important question unanswered. The issue of respect for democratic institutions merits more rigorous consideration.

The consequence of the case was a *proposed amendment to the Hungarian Electoral Procedure Act*, which would have allowed the taking of a 'private' image of a ballot paper without compromising the secrecy of the ballot. According to the explanation attached to the statute, the amendment was required as a result of this decision, which specified that taking a private picture of the ballot paper does not breach the vote's secrecy. In the end, this proposal *was removed from the final text of the amendment* to the law, but still, it should be noted that no such conclusion can be drawn from the ECtHR judgment. In connection with the amendment, facilitating vote buying was also raised as a counter-argument, however, when someone waives the secrecy of their vote, this does not violate the principle of secret ballot. The State must ensure the conditions under which the vote can be cast secretly. Based on this, e.g. the polling station or the envelope guarantees the principle of secrecy, but their use by voters is not obligatory.²⁷ Under the current regulations it is possible to take a photograph of the ballot paper for one's own personal use. However, if anyone gives compensation for this vote, it violates the purity of the election.

In conclusion, the judgment further clarifies the ECtHR's case-law on predictability. It points out that legislation restricting freedom of expression

26 Id. Dissenting opinion of Judge Dedov, para. 10.

27 Gábor Kurunczi, 'A választójog', in László Trócsányi et al. (eds.), *Bevezetés az alkotmányjogba – Az Alaptörvény és Magyarország alkotmányos intézményei*, HVG-ORAC, Budapest, 2019, p. 167.

must be treated more strictly in connection with electoral procedures, stating that it must not be in any way misleading or controversial. In the present case, the ECtHR also pointed out that there was a difference of opinion even between the judicial forums within a Member State, so that it is clear that the rules restricting freedom of expression are not entirely clear. *The conclusion of the Grand Chamber* is surely to be welcomed, as it reaffirms the notion that *political speech can only be restricted within a very narrow range*.