

Hungary's Pepsi Island Case

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A Hungarian court recently ruled against an attempt by local officials to bar gays from a cultural festival. Good news, but more legal reform is needed to ensure the same thing doesn't happen again.

Every year since 1994 a weeklong festival is held on a small island on the Danube where it enters Budapest. "Pepsi Island", as it is known after its primary sponsors, or just "the Island", has become an established youth cultural event, attracting many thousand people from around Europe. It has also served as an effective outlet for information and counselling on all aspects of civil, political and economic rights, featuring spokespersons from every strand of Hungary's burgeoning civil society, including gay and lesbian groups. For many, the Island has come to signify an annual oasis of tolerance in a country not known for its liberal politics.

That reputation nearly ended at the most recent festival in August 2001. On 10 July that year, at the initiative of a local mayor, István Tarlós, the Island's organisers met with a number of local officials, including the mayor himself and two top police directors. [1] At the mayor's request, an agreement was signed by all present, whereby "in order to protect minors [...] at the Pepsi Island [...] no homosexual information programmes under any name [...] shall take place."

News of the agreement caused a storm of protest and media attention in Budapest, galvanising the country's gay community to challenge both the authority and the constitutionality of the agreement. The reaction of the state was ambiguous. On the one hand, the police first prevaricated over allegations that the mayor had abused his power, then handed the investigation over to the very police force whose director had signed the agreement. Before any investigation had taken place, the Minister of Justice, Ibolya Dávid, declared publicly that the mayor had not acted beyond his mandate.

The judiciary, on the other hand, in the form of the local district court, acted swiftly to grant an injunction barring the agreement from taking effect, on the grounds that the measure was discriminatory. [2] The decision was surprising given that it flies in the face of a precedent set by the Constitutional Court five years earlier. [3] This temporary injunction was appealed by the mayor, but ultimately, on 11 February 2002, the same court finally ruled on the agreement, finding it unconstitutional and void.

The gay information programmes went ahead. But, apart from starting a healthy public debate on sexual diversity, the case bears further examination for the light it throws on the protection of fundamental freedoms in Hungary. Had the country's civil watchdogs been less swift, the agreement could well have taken on *de facto* legal force despite its manifest illegality. Had the court ruling been more conservative, Hungary's nascent gay movement could today have found itself increasingly hounded from numerous social forums.

Abuse of power

Although the agreement was a private understanding, apparently consistent with the mayor's power to contract with multiple parties under civil law, it nevertheless pertained to persons other than the signatories and contained an abstract prohibition concerning them with apparent general force. It presented itself not as a contract but as a *legal norm*, apparently binding on any person who might organise "homosexual information programmes". Although no sanction is stipulated for non-signatories who may breach the agreement, the signatures of the police directors is an implicit indication that violation may result in police action. The agreement appears to be an administrative decree disguised as a civil contract - concealed legislation, in other words.

The mayor, of course, has no legislative powers, and those of the wider self-government are strictly limited. In Hungary, limitations on personal liberties, as well as the legal status of non-governmental organisations, can only be regulated by acts of parliament. In exceptional cases, parliament may grant the mayor authority to take *administrative measures* against persons deemed to be a menace to society. [4] Indeed, the mayor claimed that he was acting in the interests of public administration, but no evidence was presented to demonstrate his authority to do so. Under Hungarian law, an act introduced without parliamentary authority is "non-existent", and cannot be enforced by the state, even on a temporary basis. [5] However, even if the agreement was merely a civil contract, its legality would still be doubtful. The issue is technical: the mayor and police force of Óbuda-Békásmegyer have no ownership over the island - it is the property of Budapest City Local Government. The signatories have no right to contract over the island.

A conflict of rights?

However, let us assume for a moment that the signatories did own the territory in question. Would the agreement then have been legal? In other words, what are the guarantees to prevent an owner of property from prohibiting, through a civil contract, the presence of "homosexual information programme" organisers at a cultural festival open to all?

Private individuals may freely choose to sign any agreement, of their own devising or not, and may freely decide its content, as long as it does not break the law. [6] Particularly relevant in this case is the Article 70/A of the Hungarian Constitution, guaranteeing human rights to all without discrimination. The Constitutional Court has ruled in the past that protection from discrimination on grounds of "sexual orientation" can be inferred from the Article's phrasing, [7] although this is not specifically listed as a protected ground. [8]

However, a potential conflict of rights arises in the idea that the agreement's objective was to protect children. In a previous ruling, on the *Rainbow* case, the Court held that the state may limit a child's fundamental freedom of association in the interests of the child's equally fundamental right to state protection. [9] Refraining from any moral pronouncements on homosexuality, the Court argued, in the *Rainbow* case, that children under a certain age cannot foresee the consequences of contact with an organisation with adult gay members, and must therefore be protected. [10] Despite its apparent neutrality, the ruling appeared to sustain, rather than challenge, public prejudice regarding homosexuality. [11]

In court, the mayor drew on this ruling to argue that the purpose of the agreement was to protect young people. The case thus raised a fundamental question: can the duty to protect children can be invoked as a rational and necessary reason for limiting the rights of other individuals to non-discrimination? If so, were this reasoning followed consistently it is not difficult to imagine the severely restrictive measures that might follow - the gay and lesbian movement would be forced behind closed doors, as it was at the start of the 20th Century. Even the hard-won parental rights of homosexual parents would be in doubt.

The district court's ruling that the agreement was indeed in violation of Article 70/A, and therefore void irrespective of the legal status of the signatories, is therefore encouraging.

Beyond the Constitution

But the case also illustrates the extent to which other organs of the state, including officials of the executive, may manifest prejudice and homophobia and influence the general public. In the face of this, and with continuing evidence of anti-gay sentiment among the general public, the situation of gays and lesbians could be greatly aided if there was less ambiguity in Hungary's laws generally. In this, the EU accession process should prove an important catalyst.

The only law on Hungary's books to specifically prohibit discrimination on grounds of sexual orientation is the Law on Health. [12] Otherwise, like the Constitution, the Labour Code contains

a "saving clause" barring discrimination for any "other, not work or contract-related circumstance". [\[13\]](#) The importance of the Constitutional provision cannot be under-estimated, but it leaves considerable latitude for interpretation with the Court.

In 1995, the Court ruled that exclusion of same-sex couples from the institution of "partnership" was discriminatory. [\[14\]](#) At the same time, only heterosexual partners and spouses are eligible for artificial insemination. [\[15\]](#) And partners - whether gay or not - cannot adopt children (although single persons can), and are not eligible for family reunion in Hungary. [\[16\]](#)

On the other hand, several petitions concerning the constitutionality of Hungary's "age of consent" provisions have been pending with the Court for years without resolution. Article 199 of the Penal Code, stipulates 18 as the age of consent for "unnatural sodomy" as against 14 for heterosexual intercourse. Evidence suggests that application of this provision has led to long prison sentences for gay men, even in cases of consensual relationships, for acts that are not punishable in the case of heterosexual relationships. [\[17\]](#)

The article is one of three Penal Code provisions under the heading "crimes against sexual morals", which contain distinctions based on sexual orientation. The activity described in Article 200 as "forced unnatural sodomy" is distinguished from the same activity defined in Article 198 as "violence against morals" only in that the perpetrator and victim are of the same sex. Article 209 mandates police investigation of violent crimes "against sexual morals" committed by heterosexuals only if the victim lodges a complaint. Homosexual rape and "unnatural sodomy", by contrast, require police investigation in all circumstances.

Regulations in other areas of public life similarly mitigate against full acceptance of gay participation in society. One such example is the "C" questionnaire, which by law must be filled by applicants for certain public positions. [\[18\]](#) This features a query on the applicant's extramarital relationships "including homosexual", without stating the consequences of such an admission. The list of affected posts is long, including ambassadors, state secretaries, deputy state secretaries, leaders of Parliamentary offices, leaders of the Prime Minister's Office, heads of the armed forces, leaders of state economic organisations, heads of state-owned banks and insurance companies, and those working for the national security special services.

Defence forces regulations regarding the mental and physical suitability of soldiers, exhibit the most outdated and homophobic notions. Homosexuality is listed as a "disturbance of the personality", a kind of psychopathy indicating a "dysfunction of the sexual life". [\[19\]](#)

As part of the EU accession process, the European Parliament stated in a resolution that it would "not give its consent to the accession of any country that, through its legislation or policies, violates the human rights of lesbians and gay men" [\[20\]](#) Other instruments relevant to Hungary's accession are the binding Framework Employment Directive and the non-binding EU Charter of Fundamental Rights, both of which include references to "sexual orientation" in their anti-discrimination provisions. Hungarian NGOs can and must use these tools to address its continuing legal gaps, and to ensure that, in future, public agreements like that of the Pepsi Island will not only be untenable, but unthinkable.

Footnotes

[\[1\]](#) Colonel Endre Komáromi, Public Security Director of Budapest Central Police Station and Colonel Tamás Simon Director of the Óbuda-Békásmegyer Police Station. István Tarlós is mayor of the Óbuda-Békásmegyer district, which is located across the river from the island on the Pest side.

[\[2\]](#) Decree 17. P. III. 22.429/2001/7 of the Court of Budapest Districts II. and III., 23rd July 2001. The decree was a response to an action taken by Hattér Support Society for Gays and Lesbians of 12 July, less than two weeks earlier.

[\[3\]](#) In the *Rainbow* case - see below, fn 10.



[4] Ficzer, L. ed. (1998), *Magyar Közigazgatási Jog*, pp. 191-192.

[5] *Ibid.* p.331.

[6] Hungarian Civil Code, Art. 200 (1).

[7] Constitutional Court Decision 20/1999 (VI. 25.) (For the justification see: subsection 1.2. section II.)

[8] Article 70/A prohibits discrimination on grounds of "race, colour, gender, language, religion, political or other opinion, national or social origin, financial, birth or *any other status*." Emphasis added.

[9] Hungarian Constitution, Article 67 (1).

[10] Constitutional Court Decision 21/1996 (V. 27.) taken at the request of the President of the Supreme Court regarding some questions of interpretation of the Constitution arising from the refusal to register the Rainbow Association.

[11] See Kiss J. (1996) "A szivárvány teszt" in *Beszélő*, July 1996, pp. 26-37.

[12] Law CLIV on Health, 1997, Article 7.

[13] Labour Code, Article 5.

[14] Constitutional Court Decision 14/1995 (III. 13.) AB.

[15] Law CLIV of 1997, Article 167.

[16] Law LXXXV of 1993, Article 17.

[17] See Géza Juhász "Huszonöt év kilenc hónap. A Habeas Corpus ügyei" ["Twenty-five years and nine months. The Cases of Habeas Corpus"] in *Mások*, February 2002. "The appeal court will decide whether a prior decision, which sentenced nine gay and bisexual men to spend altogether twenty-five years and nine months in prison for committing 'unnatural sodomy' and 'depravation', was lawful or not."

[18] Law CXXV of 1995.

[19] Attachment 037a to measures 7/1996 (VII. 30.) HM-NM and 12/1997 (V. 16.) HM, issued by the Defense and Health Ministries.

[20] Resolution B4- 0824 en 0852/98 "On equal rights for gays and lesbians in the EC", 17 September 1998.