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The Red Star Story and the ECtHR in the Hungarian Legal Practice

International legal obligations weave around and pervade States legal system but these norms can reach their aims only if two conditions meet. First, the legislator shall place international norms into domestic legal order by all means; that is the assumed international obligations should be more than isolated, marginalised legal texts without any effective connection with domestic norms. They should derogate the norms that already exist in the legal system if these are not in conformity with the international legal provision in question and they should also be guidance for future legislation. Second, the organs and authorities which serve for the enforcement of legal provisions shall know and apply the content and provisions of the assumed legal obligations.

Application of law and its enforcement mainly belongs to organs of the executive and judicial power and in a huge amount of cases; the application of law, including international law takes place at administrative level. Many cases before a court have also administrative background that means decisions of administrative organs are often revised judicially as legal remedy, thus if one wishes to examine the enforcement of international legal norms in the legal practice, the research shall start at the level of administrative organs.[2] Nevertheless, law obliges only courts to make available the anonym version of all the judgments and orders from the 1st July 2007 via an internet based database[3] and as administrative decisions do not fall under the scope of this provision, in many cases the content of an administrative decision can only be derived from judicial decisions if any party to the administrative decision started a judicial review procedure. Therefore, no general statements can be derived in this issue, but a sort of picture can be shown by presenting the legal history of a specific case revealing many sides of the question of applicability of the decisions of the European Court of Human Rights [hereinafter: ECtHR].[4] The red star cases of Hungary revealed many legal aspects, hereby only the application of ECtHR judgements are to be consulted: application of those which contain relevant interpretation of human rights in the topic connected to the legal problem and then the application of those which *expressis verbis* obliges Hungary in the exact case.

I. The administrative authority meets the problem revealing international obligations

I.1. The background of the main case

On 21st February 2003 Attila Vajnai the Vice-President of the Workers' Party, a registered left-wing political party, the, held a speech at a lawful demonstration. It took place in Budapest at the former location of a statue of Karl Marx which had been removed by the authorities., He wore a five-pointed red star [hereafter: the red star] on his jacket as a symbol of the international workers' movement. In application of Article 269/B (1) of the Criminal Code in force at the time,[5] a

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[2] Article XXVI (7) Everyone shall have the right to seek legal remedy against decisions of the courts, public administration or other authorities which infringe their rights or legitimate interests. Fundamental Law of Hungary, 25th April 2011 (entered into force: 1st January 2012) [hereinafter FL].

[3] See: Bírósági Határozatok Gyűjteménye (Collection of Judicial Decisions) http://www.birosag.hu/ugyfelkapcsolati-portal/anonim-hatarozatok-tara. The website has no English version.

[4] In Hungary the ECHR enterred into force on 5th November 1992. See: Status of the Convention for the Protection of Human Rights and Fundamental Freedoms.
http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG (14.11.1014.)

[5] Article 269/B – The use of totalitarian symbols (1) A person who (a) disseminates, (b) uses in public or (c) exhibits 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, commits a misdemeanour – unless a more serious crime is committed – and shall be sentenced to a criminal fine.

policeman called on him to remove the star, which he denied. His identity was checked, his clothes were screened and he was taken to the police station. Subsequently, criminal proceedings were instituted against him for having worn a totalitarian symbol in public.[6]

On 11th March 2004 the Pest Central District Court convicted Vajnai for the offence of using a totalitarian symbol. It refrained from imposing a sanction for a probationary period of one year. Vajnai appealed to the Budapest Metropolitan Court stating that the restriction on the usage of red star as a symbol of workers is against freedom of expression. Drawing an equality line between the red star as a symbol of totalitarian regimes and that of the workers and the establishment a total ban on its usage is discriminative. As the principle of non-discrimination is also a basic value of the EU (at that time, the Community), the Vajnai case was among the first Hungarian cases which were submitted to the European Court of Justice [hereinafter referred to as ECJ] in fundamental rights issues.[7] On 6th October 2005 the ECJ declared that it had no jurisdiction to answer the question referred by the Budapest Metropolitan Court as the national provisions outside the scope of Community law and when the subject-matter of the dispute is not connected in any way with any of the situations contemplated by the Funding Treaties[8]

On 16th November 2005 the Budapest Regional Court upheld the conviction. Then, Vajnai alleged that it constituted an unjustified interference with his right to freedom of expression, in breach of Article 10[9] of the European Convention on Human Rights [hereinafter: ECHR], therefore he initiated a proceeding against Hungary before ECtHR. The ECtHR was therefore empowered to give the final ruling on whether a restriction embodied in Hungarian criminal law is reconcilable with freedom of expression as protected by Article 10 of ECHR, whether the domestic legal interference was relevant and sufficient to protect higher principles than the one expressed by Article 10 (1) and whether the measure taken were proportionate to the legitimate aims pursued.[10]

Following its case law related to the issue, the ECtHR held that the Hungarian regulation in force was not proportionate to the aim of protecting the feelings of the society to which the red star

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(2) The conduct proscribed under paragraph (1) is not punishable, if it is done for the purposes of education, science, art or in order to provide information about history or contemporary events. (3) Paragraphs (1) and (2) do not apply to the insignia of States which are in force."

[6] Unfortunately the court decisions of that time are not available therefore the legal statements are to be consulted from secondary materials. See: English summary of the case in the judgment of the ECtHR Vajnai v. Hungary (Application no. 33629/06) ECtHR, Judgment 8 July 2008, Reports of Judgments and Decisions 2008 [hereinafter: Vajnai case (ECtHR)] point 6.

[7] In its order for reference the Budapest Metropolitan Court observed that in several Member States the symbol of left-wing parties is the red star or the hammer and sickle, whereas the Hungarian Criminal Code prohibits the use of those symbols. Therefore, the question arises whether a provision in one Member State prohibiting the use of symbols of the international labour movement on pain of criminal prosecution, whereas the display of those symbols on the territory of another Member State does not give rise to any sanction, is discriminatory. The Budapest Metropolitan Court thus referred the following question to the Court for a preliminary ruling: „*Is Article 269/B, first paragraph, of the Hungarian Criminal Code, which provides that a person who uses or displays in public the symbol consisting of a five-point red star commits a minor offence, compatible with the fundamental Community law principle of non-discrimination*?" C-328/04 *Vajnai*, order of the Court 6th October 2005, points 7-8. [hereinafter: Vajnai case (ECJ)]

[8] Vajnai case (ECJ), points 12-14.

[9] Article 10 Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222, entered into force Sept. 3, 1953. [hereinafter: ECHR].

[10] Vajnai case (ECJ), point 45.

symbolized the terror of the communist regime;[11] the symbol was not a real and present danger that needed to be ceased by such an interference to the practice of the freedom of expression Therefore; the relevant regulation of the Criminal Code violated Article 10 of the ECHR.

One would think that the story ended with the necessary modification of the Hungarian criminal law, but it rather took another turn. Before going in deep in the case, it is important to see how the relationship of international law and domestic law in Hungary is regulated.

I.2. International law in the Hungarian legal system

However, Hungary has a new constitution called Fundamental Law [hereinafter referred to as FL] since 2012, the content of rules regulation the relationship between international law and domestic law are the same as the corresponding rules of the former Constitution (Act XX of 1949 on the Constitution of the Republic of Hungary as revised in 1989-90, in force until 31st December 2011; hereinafter: Constitution).[12] Article Q of the FL divides the norms of international law into three groups.[13]

(1) The '*generally recognised rules of international law*', that is the customary international law, *ius cogens* and general principles of law recognised by civilised nations,[14] have at least constitutional rank in the Hungarian hierarchy of legal norms, because they can be regarded as part of the constitution, moreover, *ius cogens* norms even have priority over it. Corresponding to the monist approach, no further act is necessary to give these norms effects in domestic legal system.[15]

(2) As regards the so called '*other sources*' the FL does not declare their priority over domestic law and demand transformation on the ground of the dualist approach, that is the incorporation of international legal norms in Hungarian legislative acts.[16] It concerns treaties, mandatory decisions of international organs and certain judgements of international courts. As regards the decisions of the ECtHR, they are not direct sources of international law; instead, they

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[11] The Government of Hungary argued that *"(…) in 1945 Hungary and other countries of the former Eastern block had been liberated from Nazi rule by Soviet soldiers wearing the red star. For many people in these countries, the red star was associated with the idea of anti-fascism and freedom from right-wing totalitarianism. It is before the transition to democracy in Central and Eastern Europe, serious crimes had been committed by the security forces of totalitarian regimes, whose official symbols included the red star."* Vajnai case (ECtHR) points 36-37. The Government even invoked the decision of the Hungarian Constitutional Court on the same subject which was had been elaborated several years before the case in question. It fortified the Government argumentation as it justified the legality of the ban on the usage of the red star by the same historical background of the State. See, Constitutional Court Decision 14/2000 (V. 12.) ABH 2000, points 92-101. [available in English: http://www.alkotmanybirosag.hu/letoltesek/en_0014_2000.pdf (09.07.2014.)] According to the reasoning of the ECtHR "*two decades have elapsed from Hungary's transition to pluralism and the country has proved to be a stable democracy. (…) Moreover, there is no evidence to suggest that there is a real and present danger of any political movement or party restoring the Communist dictatorship. The Government have not shown the existence of such a threat prior to the enactment of the ban in question."* Vajnai case (ECtHR)point 49.

[12] Chronowski Nóra – Csatlós Erzsébet: Judicial Dialogue or National Monologue? The International Law and Hungarian Courts, ELTE Law Journal, 2013/1. p. 8. On the relation of international law and Hungarian law (before FL), see Chronowski Nóra – Drinóczi Tímea – Ernszt Ildikó: Hungary, In Dinah Shelton (ed) International Law and Domestic Legal Systems – Incorporation, Transformation, and Persuasion, Oxford University Press, Oxford, 2011, p. 261-268.

[13] It has to be noted that in the Hungarian legal system EU law is not international law, it is a sui generis legal system and it is also regulated as such in the FL. See Article E of the FL [it was Article 2/A in the Constitution] Constitutional Court Decision 143/2010 (VII.14.) ABH 2010, IV.2. p. 703. [available in English: http://www.alkotmanybirosag.hu/letoltesek/en_0143_2010.pdf (09.07.1014.)]

[14] The category of 'generally recognised rules of international law' is explained and explored by the practice of the Constitutional Court. Constitutional Court Decision 53/1993 (X.13.) ABH 1993, p. 327. [only the summary is available in English: http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-1993-3-015?fn=document-frameset.htm$f=templates$3.0 (09.07.2014.)] and Constitutional Court Decision 30/1998. (VI. 25.) ABH 1998, p. 220. [available in English: http://www.alkotmanybirosag.hu/letoltesek/en_0030_1998.pdf (09.07.2014.)].

[15] Molnár Tamás: A nemzetközi jogi eredetű normák beépülése a magyar jogrendszerbe, Dialóg Campus, Budapest-Pécs, 2013, p. 65.

[16] Act L of 2005 on the procedure related to international agreements [hereinafter:Act L of 2005] Article 9 (1).

are interpretations. However, it is different when the State was party to the dispute in which a judgment was delivered. In 2003 the Constitutional Court declared that the judgment of the International Court of Justice issued in a dispute between Hungary and Slovakia is neither a norm nor a treaty, but two years later, in 2005, the new act on the procedure regarding treaties was adopted and it reformulated this opinion by stating that decisions are binding and shall be executed in Hungary if the State is a party to the settled dispute. This decision shall be promulgated with the appropriate application of the provisions regarding the promulgation of the treaties in the Official Gazette.[17] This obligation does not refer to decisions in litigation where the other party to the dispute is a private individual and not a State, like in the case of ECtHR.[18] In such cases the decisions of the organ having jurisdiction over the disputes in relation to the treaty shall be obligatory in the course of interpreting it,[19] thus the decision is not a source of law; however, it can be a significant guidance for the interpretation of treaty-based obligations.[20] This fact was also acknowledged a year earlier by the Constitutional Court when it had stated in decision 18/2004. (V. 25.) that the jurisprudence of the ECtHR forms and obliges Hungarian legal practice. This kind of obligation refers to the interpretation of the different provisions of the Convention and not to the judgment itself.[21]

(3) The third category is the international soft law (e.g. recommendations, declarations, final acts) which is ignored by the FL and also by acts. These norms are not legal provisions but moral ones issued from the general constitutional provisions related to obligation of cooperation with the community of nations.[22]

II. The history repeats itself: when administrative authority meets the problem of application of international law again

II.1. The facts that happened: does the policeman have to know the legal practice of the ECtHR?

Several years later but six months after the ECTHR judgment on *Vajnai v. Hungary*, on 21st December, 2008, Vajnai participated at a demonstration, held a speech again and he was handing flyers decorated by had five pointed red stars which blamed the capitalism when the police intervened again, for the same reason as years ago. He was accused again with the offence of using a prohibited symbol of totalitarism. The same police procedure was carried out again.[23]

Vajnai submitted a complaint to the *Independent Police Complaints Board* (IPCB) against the police action arguing that the police violated his fundamental rights concerning freedom of expression. The IPCB is an independent body; it can proceed and investigate certain police measures or acts, examine them in a fundamental right protective view and decide on the breach or non-breach of rule of law.[24] It declared the consistency of the police action with the fundamental rights.[25]

Vajnai appealed for the judicial review of this administrative decision arguing that the police action based on the Criminal Code violated his fundamental rights as it ignored the statements of

[17] See, Article 13 of Act L of 2005.
[18] Molnár: i.m. p. 184
[19] Article 13(1) of Act L of 2005.
[20] See, Municipal Court of Budapest Decision 24.K.35.639/2006/25. in: Chronowski – Csatlós: i.m. p. 27.
[21] Blutman, László: A nemzetközi jog használata az Alkotmány értelmezésénél, Jogtudományi Közlöny, Vol. 64, 2009/7-8. p. 301-315, 304.310.
[22] Article Q (1) of the FL. See, Csatlós Erzsébet: Alkotmánybírósági határozatok: a nemzetközi jog mint értelmezési tampon, p. 442-445. and A Kúria (Legfelsőbb Bíróság) gyakorlata és a nemzetközi jog, p. 479-482. in: Blutman László (ed.): A nemzetközi jog hatása a magyar joggyakorlatra, HVG-ORAC, Budapest, 2014.
[23] See, Supreme Court Decision Kfv.VI.38.071/2010/4. [not available in English]
[24] Article 92 of the Act XXXIV of 1994 on the Police.
[25] Budapest Police Headquarters, VI. District Police 146-105/12/1/2009.P. [in: Supreme Court Kfv.VI.38.071/2010/4.] See Act XC of 2005 on the freedom of electronic information, Article 3.; 7-8.; 16-20.; 21 (2). Act 2011 of CLXI on the organisation and administration of courts, chapter XII., Article 163-133.

the *Vajnai v. Hungary* case of the ECtHR. Contrary to the strict provisions of the Criminal Code, the ECtHR judgment definitely declared that the Hungarian regulation on total ban on the usage of red star is excessive and it violates the freedom of expression.

The court of first instance held that the police action was consistent with the law as the policemen acting on site had a reasonable suspicion to consider Vajnai's behaviour illegal; that he violated the ban on the usage of totalitarian symbols, the law in force at the time which was the same as several years ago, when he was first proceeded for the same offence. As regards the freedom of expression defined by Article 10 (1) of the ECHR and the judgement of 8 July 2008 in the case of *Vajnai v. Hungary* the court acknowledged that the Hungarian regulation is contrary to the international standards and the ban on the usage of the red start is not proportional to the aim that confirms its existence. However, the policemen were not obliged to verify the personal thoughts and beliefs concerning the meaning and symbol of the red star when they performed their duties issued from the provisions of the act on the police. The reasonable suspicion of offence was the base of their procedure, they were obliged to follow the legislation in force and they were not entitled to take the inconsistency of the legislation in force and the ECHR into account.[26]

Vajnai appealed and asked the revision of the judgment before the Supreme Court of Hungary. According to his point of view, the circumstances made it unambiguous that the usage of the red star was meant to mean his left party belief and as he had had no totalitarian approach, his behaviour had not endanger the society thus it act committed was neither a crime nor an offence. This and the reasoning of the judgment of *Vajnai v. Hungary* should have been clear and for the policemen on the site or at least for the IPCB which supervised their action. The Supreme Court of Hungary reinforced the judgment of the court of first instance. The Supreme Court emphasized the fact that the handing of flyers with a banned totalitarian symbol was enough reason for the policemen to act and they did not have the duty to verify whether the behaviour a danger to the society. The examination of the circumstances of the alleged crime or offence is the task of the future criminal proceedings, thus the policemen should not be impeached for not knowing the *Vajnai v. Hungary* judgment; it is not their obligation to resolve the conflict between domestic law and international obligations. The ECtHR expressed its opinion on the conformity of Hungarian criminal regulation concerning the red star with its standards but it is addressed to the legislator thus it is the duty of the legislator to perform the necessary amendment in domestic law. The statements of the judgment were taken into consideration during the criminal proceedings as Vajnai was not condemned.[27] He tried to prove in vain that the policemen at site made a mistake and opened several procedures to gain justice and have the administrative decision annulled. None of them succeeded and had the conclusion that the administrative organs neither at first instance nor at second instance accepted to apply the statements of the ECtHR over domestic criminal law provisions.[28]

II.2. Role and application of international law, namely the ECtHR practice

The main problematic of the recent Vajnai cases from 2010 before the Hungarian courts was to alter the administrative decisions which would have been unnecessary if the administrative authorities, namely the police, would have been more flexible and move away from their duties expressed in the Police Act and take the relevant and obligatory statements of the *Vajnai v. Hungary*. In fact, the judgment obliges the State to modify its domestic law, it has no direct effect, nevertheless, international legal obligation have a nature that puts them above domestic legal provisions.[29] Not only those ECtHR judgments which were edited *pro* or *against* Hungary but those which contain statements that interprets and clarifies treaty based obligations are to be taken into

[26] Metropolitan Court of Budapest 27.K.30.848/2010/3. (revised by: Supreme Court Kfv.VI.38.071/2010/4.)
[27] Supreme Court Kfv.VI.38.071/2010/4.
[28] See, Supreme Court Kfv.II.38.073/2010/4.; Kfv.III.38.074/2010/4.; Kfv.III. 38075/2010/4.
[29] See, Dominicé, Christian: The International Responsibility of States for Breach of International Obligations. EJIL, Vol. 10. No. 2. 1999, p. 354-355.

consideration as obligatory sources of law. The State is responsible for giving it effect and having organs that enforce law the way it should be no matter if it domestic or international one.[30]

II.2.1. Doctrinal background: the key issue is the non-harmonisation of domestic law to international law

After the ECtHR judgment of *Vajnai v. Hungary* in 2008, the Hungarian Government refused the modification of the Criminal Code to deregulate the total ban on the usage of the red star. It declared that, in contrast with the reasoning of the ECtHR the historical memories and experiences still requires this kind of regulation. The Hungarian Government kept maintaining this point of view for ages, even after the second case concerning the same issue before the ECtHR, namely the *Fratanoló v. Hungary* on 3rd November 2011.[31] The situation changed with the submission of Vajnai to the Constitutional Court to re-examine the ban on the red star in the view of the two ECtHR judgments. The Constitutional Court deeply analysed Article 10 of the ECHR and the judicial practice belonging to the freedom of expression and in the view of the Strasbourg standards, and in the beginning of 2013, it reformulated its concept concerning the red star and its possible threat to society so as the unreasonable restriction to the freedom of restriction. Finally, it held that the prohibition of using the five-point red star is unconstitutional. It argued that the current regulation defines the range of criminal conducts too widely as the use of the symbols is punished in general; also the consideration of the purpose, the method or the result of the use for each symbol might be indispensable. Therefore, the provision of the Criminal Code which prohibited the use of symbols of totalitarian regimes was declared to be a violation of the requirement of legal certainty and in this context, the freedom of expression.[32] The Constitutional Court annulled the alleged provision of the Criminal Code (Article 269/B) with the effect from 30th of April 2013.[33]

II.2.2. Practical manifestations of the problem

II.2.2.1. In the lack of harmonisation which law shall be applied?

The same situation happened to Fratanoló on 1st May 2004 in Pécs, he wore a red star on his jacket at a legitimate labour demonstration. He was condemned for the offence of usage of a banned totalitarian symbol.[34] He appealed and here came the turning point: the court of second instance acquitted him by the judgment of 23th September 2008 on the ground of lack of crime. The court of second instance examined the possible danger of the symbol for the society and had the same conclusion as the ECtHR in *Vajnai v. Hungary*. Moreover, it referred to Article 3 (b) of Protocol 9 attached to the ECHR according to which Hungary is obliged to acknowledge and accept the competence of the ECtHR in connection with interpretation and application of any issues related to the ECHR and its protocols. It also declared *expressis verbis* that the lack of danger to the society grounds the qualification of the wearing of the red star a rightful act thus is cannot be classified as crime. The court of second instance confirmed this reasoning with the *Vajnai v. Hungary* case and

[30] See, Slaughter Anne-Marie – Burke-White, William: The Future of International Law is Domestic (or, The European Way of Law). Harvard International Law Journal, Vol. 47. No. 2., 2006, p. 328.
[31] The Hungarian Parliament declared the compliance of the regulation of totalitarian symbols with the social needs and refused its modification. See, Report no. J/6853. on the issues related to the execution of obligations deriving from the Fratanoló v. Hungary judgment of the ECtHR (adopted at session of 2nd July 2012 of the Parliament) http://www.parlament.hu/irom39/06853/06853.pdf (2013.07.31.) and Parliament decision 58/2012. (VII. 10.) on the acceptance of the report on the issues related to the execution of obligations deriving from the Fratanoló v. Hungary judgment of the ECtHR; Molnár Tamás: Két kevéssé ismert nemzetközi jogforrás helye a belső jogban: a nemzetközi bíróságok döntései, valamint az egyoldalú állami aktusok esete a Magyar jogrendszerrel. Közjogi Szemle, 2012/3. p. 3.
[32] Constitutional Court decision nº 4/2013. (II. 21.) ABH 2013, p. 142-143.[the summary is available in English: http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm (14.07.2014.)]
[33] Ibid, p.148.
[34] Pécs Municipal Court decision nº 12. B. 1482/2007/10.

put an emphasize on the fact that this interpretation is contrary to that of the Constitutional Court expressed in its decision of 2000.[35] The court of second instance applied international law in contrast to domestic legal provisions of the Criminal Code. In order to be able to issue a judgment which satisfies the international legal requirements of a democratic State that respects human right at the level of the ECtHR, the court of second instance had to put aside domestic law to give effect to international legal provisions. This kind of legal practice is in harmony with the Fundamental Law. International law is superior to domestic law, only by following this rule can the effect of international obligation can ensured. However, the harmony of international legal obligations and domestic legal norms is primarily the task of the legislator, and if it fails, it is the duty of the Constitutional Court to take action to restore the order in the legal system. In fact, before an international obligation is assumed and is transformed into domestic legal system, the necessary modifications of domestic law shall be done to avoid norm conflicts. Nevertheless, if grain of sand slips into the machine or the legislator cannot follow the changes in the necessary speed, those entities who apply law need to take steps to achieve the same result that is the application of law in compliance with international obligations.

Sometimes this rule is ignored. At third instance, the Pécs Court of Appeals altered the judgment of the second instance and held that Fratanoló was guilty for usage of a totalitarian symbol. It was in 2010. Due to this inconsistency of judicial practice, Fratanoló opened a procedure before the ECtHR therefore the statements of the *Vajnai v. Hungary* were reinforced by its judgment of 3rd November 2011 and the Hungarian Government was called upon again to derogate its legislation concerning the total ban on the usage of the red star.[36]

The Supreme Court, or as it is called since 2011, the Curia, supervised the case in the view of the ECtHR judgement in *Fratanoló v. Hungary*, and acquitted Fratanoló and declared the lack of crime and offence. It held that Fratanoló expressed his political opinion while wearing the red star at a lawful demonstration of the labour party thus this act is protected by the freedom of expression guaranteed by Article 10 (1) of the ECtHR. His behaviour was not threat to the society as it could not be associated with any motivation to restore the communist dictatorship thus no crime was committed. Moreover, the ECtHR a draw the attention to the fact that the Hungarian State was not entitled to maintain such restriction to the freedom of expression.[37]

II.2.2.2. Which level of law enforcement is obliged to take international obligation into consideration?

On 29th July 2012 the same happened again as in the Vajnai story: somebody wearing a red star and handling flyers with a red star at a lawful demonstration had to go through the same police action. This person submitted a complaint and the ICPB rendered its decision. This time its reasoning expanded its competences and stated that the provision of the criminal Code concerning the red star is violates the Fundamental Law as well as the ECHR but it is beyond the scope of the police.[38] The National Police Headquarters refused the complaint arguing the well-known phrase: it is not the task of the police to verify the circumstances, their duty is to act in the case of a reasoned suspicion of a crime and that was the case when they realized the usage of a banned totalitarian symbol.[39]

However, this time, the judicial review of the administrative decision annulled the decision and ordered the administrative authority to pursue a new procedure.[40] The court declared that the

[35] Baranya County Court decision nº Bf. 121/2008/5.
[36] Fratanoló v. Hungary (Application no. 29459/10) ECtHR, Judgment of 3 November 2011, [hereinafter: Fratanoló case (ECtHR)] points 20-28.
[37] Curia decision nº Bfv.III.570/2012/2.
[38] ICPB decision nº 70/2013. (III.13.).
[39] National Police Headquarters decision nº 29000-105/376-1/2013.RP.
[40] Municipal Administrative and Labour Court decision nº 17.K.31.995/2013/2.

policemen at site should have known that the act, namely the usage of the red star is not always a crime or offence.

What was different in this case? First, the court declared that all the authorities, like the police, entities and person who apply law, shall do it in conformity with the ECHR (and the relevant case law of the ECtHR) and the Fundamental Law. At the same time, this obligation may only be performed if the legal provisions make this kind of interpretation possible. The main dispute between the parties referred to, in the court's point of view, whether the relevant provision of the Police Act can be the object of interpretation or not. The court held that it was.

The police decision argued that the procedure of the police was grounded on the fact that they are obliged to do so if the alleged criminal is caught during the commitment of an intentional crime. Hereby, the organizer of the legitimated labour demonstration primarily gave a notice to the police that during the event the participants would probably use banned symbols due to the nature of the movement and he assumes the criminal consequences. In this case, the police was aware of the fact of usage of the red star, so as the harmless intention of its usage, so the checking of identity, screening of clothes and arresting. The police act might have been lawful but under such circumstances it was not proportional to its aim. All these acts stand for the identification of perpetrators and ensuring their presence for the criminal procedure but in this case it was not necessary. The court cited the *Vajnai v. Hungary* and *Fratanolo v. Hungary* judgments to highlight that the instruments to limit the freedom of expression should be well-grounded and proportion to the aim that demands it. It even referred to the recent decision of the Constitutional Court that finally abolished the provision of the Criminal Code in question which entered into force on 30th April 2013.[41]

In a case similar to the former one, the applicant wearing a red star badge participated in a demonstration on 1st May 2012, and he was arrested by the police and he was held at the police station for hours. No criminal procedure was opened because of the lack of crime, but the applicant submitted a complaint to the ICPB because of the procedure he had to gone through. The complaint was refused, so as his appeal to the National Police Headquarters.[42] Therefore, he appealed for the judicial review of the administrative decision.

The court of first instance referred to the fact that the annulation decision of the Constitutional Court which deregulates the ban on red star enters into force only on 30th April 2013, thus the authorities acted in conformity with the law in force at the time of the demonstration. It means that the court acknowledged the slight of ECtHR statements and emphasized their indirect effect. The court of first instance emphasized that the policeman at site is in not in that position to be able to examine the intentions of wearing the red star and furthermore, the fact that no criminal procedure was opened against the plaintiff, is not a ground for the revision of the police action taken against him at site and at the police station. It was the normal way of administrating his behaviour as he wore a banned totalitarian symbol. The court of first instance invoked the ECtHR case law and pointed out that it obliges the legislator. The policeman is not a legislator therefore he was not entitled to resolve the conflict of international obligations and domestic legal provisions.[43]

The applicant submitted a claim for supervision of this judgment. He argued that the police act was unlawful as the policemen at site did not examine the intentions of wearing the red star. In his point of view, it is not enough to prove that a behaviour is formally violates the criminal law, the reasoned suspicion is not enough to arrest a person and keep him at the police station for a while especially when both of the ECtHR judgments against Hungary on the use of the red star and its relationship to the freedom of expression were well known at that time. Therefore, the policemen at site, or at least, the administrative authority, the National Police Headquarter should have known that the applicant's behaviour is not in every case a danger to the society. The action of the police is unlawful not only because of this fact. If a criminal is caught in the act, the arrest serves for the

[41] Metropolitan Administration and Labour Court decision nº 17.K.31.995/2013/2.
[42] National Police Headquarters decision nº 29000/105/547-56/2012.P.
[43] Metropolitan Administration and Labour Court decision nº 20.K.31.328/2013/3.

ensuring of the start of criminal procedure. In this case, the applicant did not want to impede the police procedure thus it was not necessary to hold him in custody.

The Curia reinforced the statements that had already been articulated in former cases: it is not the duty of the policemen at site to verify neither the regulations of international conventions nor the Criminal Code; their duty was to arrest the one who is caught in the act of an intentional crime. Therefore, the police and its officers did not violate any legal provisions, including the ECtHR practice; they just followed those which refer to their activity.[44]

III. Concluding remarks on the lessons learned from the case and on the highlighted problems

Application of international legal sources is challenging, however these norms are the part of the Hungarian legal system as well as domestic ones. Their transformation into the legal system is regulated by constitutional provisions and it has to be noted that the effect of the assumed international obligations is above all; the Constitutional Court held that international law is not to be adjusted to the conditions of domestic law, but rather domestic law should be adjusted to comply with international law.[45]

However, norm conflicts can always emerge in practice and it even problematic when the authority is not aware of the fact that the legal field in question is highly affected by international legal sources which shall overwrite domestic ones if they are contrary. It derives from the primacy of international law, although in legal practice the international judicial interpretation of treaty based obligations cause problems. The application of a self-executing treaty causes fewer problems but as the direct effect of ECtHR judgments is not *expressis verbis* acknowledged, the effect of their content is challenged.

Since the entry into force of the modification of the law on the procedure relating to international treaties, on 1st January 2012, it is settled in law that the decisions of the organ having jurisdiction over the disputes in relation to a treaty or convention shall be obligatory in the course of interpreting it.[46] Constitutional Court decision 18/2004. (V. 25.) stated that the jurisprudence of the ECtHR forms and obliges the Hungarian practice. This kind of obligation refers to the interpretation of the different provisions of the Convention and not to the judgment itself.[47] However, there seems to be a little contradiction when the Constitutional Court stated almost ten years later, in 2013, that the judgment of the ECtHR is declarative, it does not result change in legal concepts. At the same time it declares that these judgments help the interpretation and exploration of the content of fundamental rights. The content of the conventional rights is, in fact, embodied in the case law of the ECtHR, therefore they contribute to the uniform interpretation and application of them. The Strasbourg practice defines the minimum level of fundamental right protection, but it does not impede domestic law to apply a higher level.[48] Several rows later, the Constitutional Court states that the Hungarian courts shall apply the domestic law in force even if the case before them is practically the same that has already been judged by the ECtHR.[49] The case law of the ECtHR can only be taken into account by the Curia while it supervises judgments of lower courts.

It means that the Hungarian law enforcement authorities shall not put aside domestic regulations in order to give effect contrary international legal norms in the legal practice. The party to the dispute shall be persistent to go through the judicial hierarchy with its problem and then get to the Curia to be able to ask a supervision of the judgment, as it happened to Fratanoló.[50] As it was already mentioned above, Fratanoló was convicted for the offence of using the red star at first

[44] Curia decision nº Kfv.II.37.807/2013/4.
[45] Constitutional Court decision nº 53/1993. (X. 13.) ABH 1993, p. 323, 333.
[46] 13(1) of Act L of 2005 on the procedure relating to international treaties.
[47] Blutman, László: A nemzetközi jog használata az Alkotmány értelmezésénél. Jogtudományi Közlöny, Vol. 64, 2009/7-8. p. 304; 310.
[48] Constitutional Court decision nº 4/2013 ABH 2013, p. 133.
[49] Constitutional Court decision nº 4/2013 ABH 2013, p. 147.
[50] Curia decision nº Bfv.III.570/2012/2.

instance, then the court of second instance released him by applying the ECtHR case law, namely the *Vajnai v Hungary* case, and then, when he was convicted again at third instance, he turned to the ECtHR with his complaint whereby the statements of the *Vajnai v. Hungary* case were reinforced. Having the judgment of the ECtHR, he asked for the supervision of his former judgment and then the Curia declared the lack of crime and released him from the punishment. According to the procedural law in force, formally this is the way of gaining justice if the ECHR guarantees a better protection of one's fundamental rights than the State regulations, if domestic law is not in conformity with the ECHR.

Although the remedy is available to give effect to a judgment which was issued in a specific and individual case of a Hungarian citizen, but what about those legal problems which were not taken to Strasbourg? The fate of that kind of case is up to the discretion of the judges, whether they intend to pick the ECtHR statements over a contrary domestic regulation or not?

As the presented cases show, the administrative authorities, the police in fact, do not even consider the fact that fundamental right issues might have not only domestic but international law sources that might help to explore the applicable law. However, as it is seen from the practice and the Constitutional Court statements, the legal order is rigid; it is not required at all to take into consideration ECtHR judgements even if it is clearly contrary with domestic law. Even if it is expressed definitely, the judgments cannot have direct effect and the long and costly way of achieving justice needs to be used even in those cases when the legal procedure was obviously superfluous and it could have been settled at administrative level. Summarizing, it is not impossible to give effect to international requirements, although this is not the most desirable way of it.