# HATE SPEECH AND THE PROTECTION OF COMMUNITIES IN THE HUNGARIAN LEGAL SYSTEM

*A SHORT OVERVIEW*

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The Hungarian notion "*gyűlöletbeszéd*" is a literal translation of the applicable terminology (hate speech) originally used in the United States of America. According to Gábor Halmai, "this type of communication includes acts of speech by which the speaker—usually driven by prejudice or even hatred—expresses his or her opinion of various racial, ethnic, religious, or sexual groups in society, or of the member of such groups, which opinion may insult the members of the given group and may incite hatred in society against that group."[1] According to the Recommendation by the Council of Europe, "the term 'hate speech' shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin."[2] The term "hate speech" itself is not used in legislation; for the purposes of written law, this term is covered by the crime of incitement against a community (Article 269 of the Criminal Code), supplemented by the crimes of the use of symbols of despotism (Article 269/B of the Criminal Code), public denial of the sins of the National Socialist (Nazi) and Communist systems (Article 269/C of the Criminal Code), and violation of national symbols [Article 269/A of the Criminal Code]. Of course, these crimes are not specific to the media, meaning that they may be committed by means other than via the media, but they constitute certain limitations to the freedom of the press. Furthermore, the Press Freedom Act lays down various provisions against hateful expressions.

## 1. The crime of incitement against a community

The Constitutional Court adopted five decisions on hate speech and the crime of incitement against a community. While the structure of these decisions may appear more or less solid, a thorough examination does reveal certain contradictions. According to Decision No. 30/1992. (VI. 10.) of the Constitutional Court (AB), hateful expressions capable of triggering hostile actions and intense emotions may be punishable. The existence of any intent to incite hatred is irrelevant. It is not even necessary to exhaust the abstract facts of the crime that the act of incitement calls for "active hatred" specifically. However, the perpetrator must be aware of the fact that his or her behaviour may trigger "active hatred" and may result in violent actions. The protected legal interest is twofold: first, such intense hazards violate public order, and second, such incitement to action involves the violation of individual rights. Merely inciting hatred does not suffice, if such incitement is not capable of leading to active violations. The Constitutional Court did not specify the level of threat that could justify any limitation to freedom of opinion. Nevertheless, as the crime is *immaterial*, the facts of the case may be

[1] Gábor HALMAI: *Kommunikációs jogok.* [*Communication Rights*] Budapest, Új Mandátum 2002. 114.
[2] Council of Europe, Recommendation No. R (97) 20, of the Committe of Ministers to Member States on „Hate Speech".

realised even if no sense of hatred is raised in the recipients of the communication; the actual execution or commencement of or preparations for harmful actions are absolutely not required. The objective possibility and the capability of the communication to lead to such consequences are sufficient for punishability. According to the Constitutional Court, the capability of the expression to disturb public order would not be sufficient reason in itself for restrictions; danger to individual rights (honour, dignity, life, physical integrity) is also necessary. Misunderstandings may arise from a reference in the decision to the standard of *clear and present danger* originating from the United States of America, under which the existence of any direct, real, and immediate threat of violation is a requisite for imposing any restriction. In the view of the Constitutional Court, the standard required for imposing restrictions is far more lenient, as the mere possibility of violating individual rights and the capability of the communication to result in such violations is sufficient. These rights must be protected against even less intensive threats, and no direct danger is required. Consequently, giving rise to any "clear and present danger" to public order is not required for the commission of the crime.

The act of using "an offensive or denigrating expression" as stipulated in Article 269(2) of the Criminal Code was held unconstitutional—thus annulled—by the Constitutional Court, which claimed that capability of disturbing public order was not amongst the facts of the crime stipulated in that paragraph, and the abstract and presumed danger of disturbing public order does not provide sufficient grounds for limiting the freedom of opinion. Furthermore, actual endangerment of individual rights is not required for committing the crime, and the abstract facts of the crime may be exhausted even without any such endangerment. While this statement is true, it is also true of that regulated in paragraph (1), which was held constitutional by the Constitutional Court (the Court believed that the difference lay in the intensity of the danger). The Constitutional Court held that freedom of opinion may not be restricted merely on the basis of expressed values, as freedom also includes the freedom to express morally questionable opinions (some "external" limit is thus needed for such restrictions). Outrageous, abusive, or intolerant expressions may not be restricted as such, and the "external" limit required by the Constitutional Court was found to be remote and theoretical. The crime of using offensive or denigrating expressions is less grave an activity, and the level of intensity of the danger is lower; this argument provided the Constitutional Court with sufficient reason to annul the respective statutory provision.

Decision No. 12/1999. (V. 21.) of the Constitutional Court annulled the phrase "other act capable of inciting hatred", which was inserted to the abstract of circumstances in 1996 as a possible form of committing the crime. The arguments were rather similar to those used earlier; the decision practically repeated the contents of Decision No. 30/1992. (V. 26.). According to the justification, the punishment of other actions capable of inciting hatred lowers the standard for possible limitations to an extent that is unconstitutional. The standard should be the standard of "incitement" as defined by the previous decision. If the act meets that standard, it would be punishable anyway. Any lower threat to the protected legal interest—meaning incitement in this case – is insufficient to justify any restriction. Besides, the term of "other actions" is not clear enough, and may lead to arbitrary restrictions.

Decision No. 18/2004. (V. 25.) of the Constitutional Court struck down yet another attempt to make the act of using offensive or denigrating expressions punishable. Without doubt, the draft amendment intended to lower the applicable standard of punishability. While attempts to lower such standards are not by definition unconstitutional, they are commonly repealed by the Constitutional Court if it believes that lowering the standard of punishability is not necessary or proportionate to the objective to be met. The Constitutional Court did believe that no further extension of the scope of protection was justified. Furthermore, the decision of 2004—apart from establishing the unconstitutionality of the amendments—even raised the

standard of restriction from its previous level established in the decision of 1992. According to the decision:

> In the case of 'incitement to hatred', the restriction of the freedom of expression is justified by the violation of, or by the direct danger of violating, the exercise of individual fundamental rights. . . . [I]t is important that the danger to public peace should be more than a mere presumption, and it is absolutely necessary to have at least a hypothetical feedback (the communication is capable of disturbing the public peace). It is the intensity of the disturbance of the public peace that "above and beyond a certain threshold ('clear and present danger') justifies the restriction of the right to free expression."

This statement is not easy to interpret. It would require direct danger (i.e. *clear and present danger*) to individual rights (honour, human dignity) for permissible restriction, but would be satisfied with the capability to disturb public order, while quoting a fundamental statement from the decision of 1992 without certain essential parts of the original text. The quoted part in its entirety is the following:

> [T]his reasoning considers not only the intensity of the disruption of public peace which—above and beyond a certain threshold ("clear and present danger")—justifies the restriction of the right to freedom of expression. What is of crucial importance here is the value that has become threatened: incitement endangers subjective rights which also have a prominent place in the constitutional value system.

This text means that clear and present danger would be required for restriction in with regard to the public peace, but even less would be sufficient for restriction in the case of honour or human dignity.

Decision No. 95/2008. (VII. 3.) AB annulled the last attempt to amend the criminal regulation of hate speech. The Act adopted in February 2008 aimed to introduce the crime of "the use of offensive or denigrating expressions" into the Criminal Code, placing the crime among the crimes against persons instead of in the Chapter on Crimes against Public Order, next to the crime of incitement against a community. This amendment would have significantly lowered the standard for restrictions: capability of harming the honour or human dignity of a person would have been sufficient, and such expressions used against a community would have been prohibited. Similarly to the previous amendment to the Criminal Code annulled by Decision No. 18/2004. (V. 25.) AB, the amendment tried to avoid the legal obstacles laid down by Decision No. 30/1992. (VI. 10.) AB by making the harm to dignity an abstract fact of the crime: in its decision of 1992, the Constitutional Court held that the mere use of such expressions may not be punished without any specific harm. However, no actual outcome, merely the capability of causing harm, was stipulated among the abstract facts of the new crime, implying that a *praesumptio juris et de jure* existed as to the actual occurrence of such harm. In its decision, the Constitutional Court followed the path it started on in its three previous decisions. The Court held that the crime of using offensive or denigrating expressions does not meet the restriction standard, as "the commission of the crime would be established even if the acts of the defendant would not be capable of disturbing public peace, or even if the expression or gesture—due to the circumstances—would not lead to the danger of harming individual rights." Actual harm is not required for punishability; "it is sufficient if the expression or gesture used is in principle capable of harming the honour or human dignity of a member of the concerned group in general." As such, there was no constitutional right or interest standing against the freedom of opinion that would justify the constitutionality of the restriction. However, the decision does not mention that the merely theoretical nature of the harm was sufficient for the effective abstract facts of the crime of incitement against a community—which crime had always been held constitutional earlier—where actual harm is not required either. The remaining question is therefore what level of probability is required for imposing restrictions, and whether the dignity of members of a community is

automatically violated in the event of using offensive or denigrating expressions. Again, the Court decided the answer to the latter question to be negative, and it maintained the *clear and present danger* standard introduced by Decision No. 18/2004. (V. 25.) AB, according to which criminal sanctions may be constitutional only to "acts leading to the clear and present danger of violent actions or to individual rights." While the insistence of the Court on maintaining this freedom of speech standard with an eventful past is not quite clear, the Court narrowed—or rather blocked—the possibility of imposing criminal sanctions.

The new Criminal Code—effective as of 1 July 2013—made minor corrections to the crime set forth in Article 269 of the Criminal Code. For example, the statutory name of the crime has been changed [see Article 332 of the new Criminal Code]. The former Hungarian name was "agitation against a community" whereas the new name is "incitement against a community." This amendment is welcome, as it makes clear that there is no point in searching for a difference in interpretation of "agitation against a community" and "incitement against a community." As to the abstract facts of the crime, communities based on disability, sexual identity, or sexual orientation have been stated as protected communities. However, this change is not expected to have practical implications, as the phrase "certain groups of the population" (also included in the new Act) has already been relied upon to cover such groups as well.

> Article 332 A person who incites to hatred before the general public against
> *a)* the Hungarian nation,
> *b)* any national, ethnic, racial group, or
> *c)* certain groups of the population—with special regard to disability, sexual identity, or sexual orientation—
> shall be liable to punishment for a felony offence with imprisonment up to three years.

Retaining the act itself of committing the crime indicates that the legislator—fully aware of its options limited by the decisions of the Constitutional Court—did not wish to establish a rule of questionable constitutionality; the rapporteur of the draft of new Criminal Code even indicates his opinion in the justification of the draft that the amendment of the Constitution would be required for adopting a more stringent provision.

## 2. The civil law restrictions of using offensive or denigrating expressions

Does civil law have anything to do with the restriction of using offensive or denigrating expressions? The final thoughts expressed in Decision No. 30/1992. (V. 26.) AB specifically recommend the application of protective measures under civil law, such as claiming non-material damages. In its Recommendation of 1997 on hate speech, the Council of Europe explicitly urges Member States to "enhance the possibilities of combating hate speech through civil law, for example by allowing interested non-governmental organisations to bring civil law actions, providing for compensation for victims of hate speech and providing for the possibility of court orders allowing victims a right of reply or ordering retraction." The system of fundamental rights typically includes individual rights that may be exercised on an individual basis. The question thus arises whether some of these rights could be transformed to "community" rights. Do communities have dignity? If the right of communities to dignity is not recognised, may the fact of belonging to a community be regarded as a manifestation of the dignity of an individual, which should be protected? In the Hungarian legal system, only a handful decisions of the Constitutional Court and of other courts use the term "dignity of a community," thereby recognising its existence and treating it as a protected value. However, no coherent theoretical considerations for such protection could be found in the available

sources. The available means of personality protection under civil or criminal law are not capable of protecting the dignity of communities. According to current judicial practice, the means of personality protection—including the protection of human dignity—laid down in the Civil Code (Article 76) are not available to legal entities or to other communities without legal personality. In order to launch any official proceedings, the victim whose personality rights were violated must be identified clearly. Consequently, no civil action may be filed for using offensive expressions against communities in general, as the victim in such cases cannot be identified. Legal entities are entitled to the protection of their honour (Article 76) and reputation (Article 78), but they do not have any dignity by definition. The crimes of libel (Article 179) and defamation (Article 180) stipulated in the Criminal Code do not protect communities, as proceedings must be launched by filing a complaint, as a form of exercising the right to self-determination, for which a victim must be identified first. The Act provides separate protection for members of national, ethnic, racial, and religious groups: any insult, violence, or threat against such persons due to their membership in the respective group is subject to more stringent punishment than similar crimes without such motive (Article 174/B). While human dignity is not specifically protected by criminal law, the crime of defamation—as described above—may be generally applicable to the violation of dignity. None of these Acts lay down explicitly that the violation of dignity may be committed against specific persons only, but the courts consistently reject any and all actions and complaints filed by individuals for insults suffered by a community.

In its Decision No. 96/2008. (VII. 3.), the Constitutional Court annulled a provision introduced into the Civil Code in 2007, which sought to lay down the necessary foundations for taking civil law measures against hate speech. The decision held that, first, the scope of the protected groups was too broad under the Act (it applied to any minority group, while the scope and number of such groups was unlimited), and second, the scope of protection was narrow and discriminative, as the Act offered protection to minority groups only, without protecting other majority identities. The Act would have allowed any and all members of such communities to file a lawsuit for the violation its rights. The possibility of parallel lawsuits was found to be a disproportionate limitation of the freedom of opinion, as it may result in disproportionate punishment of the infringer. On the other hand, the intended institution of the action in the public interest was found by the Constitutional Court to be an unconstitutional limitation to the right of self-determination, taking into consideration that such actions, in the field of consumer protection, serve to protect a social interest which cannot be protected effectively by enforcing subjective rights, but, in the subject matter at hand, they would be used to afford protection against an indirectly violated subjective right (i.e. right to dignity), instead of protecting a public interest. Consequently, all parties would seek remedy for their own violated rights, which end could not be served by the right of non-governmental organisations to bring civil law actions. However, the decision allows the conclusion that the idea of imposing civil law limitations on freedom of expression in order to combat hate speech is not unconstitutional in itself. Furthermore, the decision makes no attempt to transpose the clear and present danger standard into civil law, but shows the willingness to accept less grave harm in order to allow such limitations.

## 3. Symbols

### *3.1. Prohibited symbols of despotism*

In 1993, the following crime of the “Use of Symbols of Despotism” was introduced into the Criminal Code [Article 269/B]:

> (1) Any person who a) distributes; b) uses in front of a wider public; c) exhibits in public; a swastika, the SS sign, an arrow-cross, a hammer and sickle , a five-pointed red star, or a symbol depicting the above—unless a graver crime is realised—commits a misdemeanour, and shall be liable to punishment with a fine. (2) Any person who commits the act defined in subsection (1) for the purposes of the dissemination of knowledge, education, science, or art, or with the purpose of information about the events of history or the present time shall not be liable to punishment.

Due to claims concerning the excessive limitation of the freedom of speech, this provision was also brought before the Constitutional Court but held to be constitutional in Decision No. 14/2000. (V. 12.) AB. The judges made it clear that the limit of an acceptable restriction of freedom of speech "is where the prohibited conduct not only expresses a political opinion, deemed right or wrong, but it does more: it endangers public peace by offending the dignity of communities committed to the values of democracy." Besides public peace, therefore, the dignity of communities appeared in the Decision as a protected legal interest. According to the Constitutional Court, the use of the symbols of despotism offends the dignity of the community at large in every case, because they are harmful not only to those who were the victims of the given dictatorship but they offend every person who is committed to the values of democracy; such opinions are incompatible with democracy in general. Laconic is the statement which says that "[t]he Constitution is not value-neutral but it has a set of values. The expression of opinions inconsistent with constitutional values is not protected by Article 61 of the Constitution." Furthermore, the Court took into account the fact of disturbing the public peace and the role of special historical circumstances, which—considering the temporal proximity of the dictatorships—also support the possibility of restriction. A more lenient level of limitation to the freedom of speech might be sufficient in other countries with less of a history of turmoil. On the other hand, the prohibition is not absolute: such symbols may be produced, acquired, held, imported, exported, and used (but not in public).

This decision seems to contradict other decisions on the issue of incitement. While the judges did sense this tension, they found it solvable. The necessarily high number of violations—which may not be reached by using offensive or denigrating expressions unless using such expressions against the Hungarian nation, as all other communities protected by penalising the act of incitement are in the minority, while, as implied by the decision, the persons committed to the values of democracy are the majority—and the fact that that (unlike in the case of using offensive or denigrating expressions) no other legal means for restriction are available, taken into consideration jointly, do justify the constitutionality of the challenged provision. In fact, the decision gave birth to an independent and exceptional standard, which differs from the standards developed in relation to the crime of incitement against a minority, as the actions possibly capable of breaking the prohibition on using symbols of despotism could be far less dangerous than any incitement against a community.

In its decision of 8 July 2008 in the case of *Vajnai v. Hungary* (application no. 33629/06), the European Court of Human Rights answered the following specific question: can it be prohibited for a member of a political party to wear a red star in public, thereby expressing his political views? Vajnai decided to seek remedy in the European Court of Human Rights after he was sentenced for wearing a prohibited symbol of despotism in public. The decision held that the red star can have multiple meanings beyond its relationship with the Communist dictatorship. It is also the symbol of the international workers' movement, and is not clearly related to the dictatorship or its ideology. The actions of Vajnai were not dangerous in the sense that Hungary had a solid democracy wherein the spread of extreme ideas would not be a real possibility in the foreseeable future, and the possibility of disturbing public order was unlikely in the given situation (in and after a public meeting) leading to his sentencing. The possible indignation and uneasy feelings of citizens seeing the symbol or becoming aware of

the use thereof are not sufficient to restrict the right of others; as the return of the Communist regime is not a real threat. In conclusion, the Court found no compelling interests for the—even most lenient—punishment of Vajnai. The Court considered in general that the effective Hungarian rules in question were too "broad," meaning that it limited actions—such as the one discussed in the given case—that were otherwise protected by the freedom of expression. With regard to the two decades that passed since the change of regime and to the achievements of a continuous democratic development, maintaining this symbolic rule in the legal system openly rejecting any and all ideologies of despotism is not absolutely necessary.

While the decision takes into consideration the especially sensitive affairs in Central and Eastern Europe, the Court did not find such affairs to be compelling enough for limiting the rights of citizens in this case. It did not evaluate the two dictatorships in order to make general observations on the possible limitations on the use of their symbols. However, the demonstrative rejection of extreme right-wing ideologies is a European tendency; the symbols of Communism are prohibited in a handful of countries only. While it is uncertain what the position of the Court would be if it had to decide on the use of Nazi symbols, it is certainly possible that it would have different opinions on the two dictatorships.

After this decision, public demands were made for the removal of the red star (and of the hammer and sickle presumably) from the Criminal Code. Are such demands justified? As to the statement that the red star has multiple meanings, it is not necessarily the case in Hungary. The dictatorship that lasted over forty years caused wounds that are hard to heal. The red star rather reminds the victims of the regime and people familiar with the history of the falling of the red star from public buildings in the rebellion of October 1956 and during 1989 and not the struggle for equal suffrage of the Western European left-wing movements. This symbolic act did not mean the rejection of left-wing ideologies but embodied the insatiable desire for the abolition of the hated totalitarian regime. In other words, the red star may have a different meaning in Hungary, Lithuania, Cambodia, and France, or Italy.

In its judgement of 3 November 2011 in the case Fratanoló v. Hungary (application no. 29459/10), the European Court of Human Rights confirmed its position assumed in the Vajnai case and ruled against Hungary. The Grand Chamber overruled the appeal by the Hungarian government, and the ruling of Section II became final.

The new Criminal Code of 2012 retained the provisions of Article 269/B with hardly any change (Article 335 of the new Criminal Code), but indicates that the provisions "do not extend to the official symbols of states in force."

> Article 335(1). Any person who
> *a)* distributes;
> *b)* uses in public;
> *c)* exhibits in public;
> a swastika, the SS sign, an arrow-cross, a hammer and sickle, a five-pointed red star or a symbol depicting the above, – unless a graver crime is realised – commits a misdemeanour, and shall be liable to punishment with a fine.
>
> (2) The person who uses a symbol of despotism for the purposes of the dissemination of knowledge, education, science, or art, or with the purpose of information about the events of history or the present time shall not be punishable.
>
> (3) The provisions of subsections (1) and (2) do not extend to the official symbols of states in force.

### *3.2. The protection of national symbols*

The crime of "Violation of a National Symbol" was also inserted into the Criminal Code in 1993 [Article 269/A]:

> A person who—in public—uses an expression insulting or demeaning the national anthem, the flag or the coat of arms of the Republic of Hungary, or commits any other similar act, unless a graver crime is realised, shall be liable to punishment for a misdemeanour with imprisonment of up to one year, a community service order, or a fine.

The Constitutional Court considered the constitutionality of this provision in Decision No. 13/2000. (V. 12.), and rejected the motion for its annulment. The judges held that this provision protects the rights and lawful interests of the state and of members of the nation at the same time. National symbols are the "constitutional symbols of the external and internal integrity" of the state and of the nation, and the symbols expressing national sovereignty deserve enhanced protection. Furthermore, this provision also protects the dignity of the members of the nation, as the symbols mentioned therein—in addition to their official "role" described above—also "express that such members belong to the nation, as a community." Such—twofold—expressions of national identity deserve enhanced protection, with regard to historical circumstances, as any display of belonging to the nation had been considerably limited or even prohibited during the previous decades. These symbols gained even more importance after the change of regime in Hungary, which fact should be taken into consideration. However, the justification for the decision notes that the negative opinions on these symbols or their history, value, or importance, as well as artistic expressions, criticisms, or proposals for their change or abolition may not be subject to punishment.

The new Criminal Code (Article 334 of the Criminal Code) made minor amendments to the provisions laid down in Article 269/A of the Criminal Code by mentioning the Holy Crown among the protected symbols and by making persons using an expression outraging or humiliating the symbols—which are also listed in Article I of the Fundamental Law—or "insulting them in any other way" liable to punishment, instead of persons committing "any other similar act."

> Article 334 Any person who (in public) uses an expression outraging or humiliating the national anthem, the flag or the coat of arms of the Republic of Hungary or the Holy Crown, or insults them in any other way, unless a graver crime is realised, shall be liable to punishment for a misdemeanour with imprisonment of up to one year.

## 4. Media law measures against hate speech

In addition to criminal law measures, actions may be taken against hate speech by the means of media legislation. According to Article 6 of the AVMS Directive, Member States shall ensure that linear, non-linear, television, and other audiovisual media services do not contain any incitement to hatred based on race, sex, religion or nationality; the phrase of "*incitement to hatred*" used in the English text can be translated into Hungarian both as "*gyűlöletkeltés*" (incitement to hatred) or as "*gyűlöletre uszítás*" (instigation of hatred)—apparently, the EU did not wish to get involved in a domestic debate on Hungarian criminal law terminology. (Similarly to the Press Freedom Act, the official Hungarian text of the Directive uses the term "*gyűlöletkeltés*" (incitement to hatred).

With reference to media services and to printed and online press products, the Press Freedom Act prohibits the publication of media content that "incites hatred against any nation, community, national, ethnic, linguistic or other minority or any majority as well as any church or religious group" [Article 17(1)]. According to Article 17(2): "[t]he media content may not exclude any nation, community, national, ethnic, linguistic and other minority or any majority as well as any church or religious group." The first provision requires the capability of inciting hatred for the prohibition (irrespective of the intents of the communicator), while the latter provision prohibits the publication of media content that is capable of excluding a

group. (Note that the respective provision of the previous media act—Radio and Television Broadcasting Act, 1996 (repealed), Article 3—was most similar to the effective provision, with the important difference that it was applicable to television stations and radio channels only. Apart from that, the sole material difference between the text of the Radio and Television Broadcasting Act of 1996 (repealed) and of the Press Freedom Act is that the former prohibited "open or covert insults" to communities as well. It might be noteworthy that this rule was also included in the original text of the Press Freedom Act, but—after the outrage in Europe caused by the Hungarian media regulations—it was deleted at the request of the European Commission during the negotiations.)

Article 14 of the Media Act lays down a provision protecting members of religious communities, according to which "viewers or listeners shall be given a forewarning prior to the broadcasting of any image or sound effects in media services that may hurt a person's religious, faith-related or other ideological convictions or which are violent or otherwise disturbing."

The Media Council may take action against those who violate the above rules (as for Article 14 of the Media Act, the Office of the National Media and Infocommunications Authority proceeds as the authority of first instance).

*4.1. "Incitement to hatred"*

The question is whether the terms "incitement to hatred" and "exclusion," used in Article 17 of the Press Freedom Act, refer to a standard that is lower than the standard of "incitement to hatred" used in the Criminal Code, meaning that the rules applicable to the media are more lenient than the general rules.

The Constitutional Court considered the constitutionality of the provisions laid down in the Radio and Television Broadcasting Act, 1996 (repealed) [Articles 3(2) to (3) of the Radio and Television Broadcasting Act, 1996]—which are rather similar or occasionally identical to the provisions laid down in Article 17 of the Press Freedom Act—in its decision No. 1006/B/2001. The decision found the regulations constitutional, and made it clear that the possibility of the intervention of the media authority—which is independent of the will of the community or individual harmed—does not limit the right to self-determination and does not substitute for the enforcement of claims by holders of subjective rights. The decision of 2007 states that "the option of simultaneously available legal remedies, and even proceedings that can be conducted simultaneously under different branches of law regarding the fundamental rights complementing each other, does not violate, and, what is more, does not even restrict unnecessarily the freedoms of expression of opinion and of the press." Accordingly, outside of the system of criminal law, sanctions against hate speech may be constitutionally prescribed in the media regulations, too. The decision also mentions the obligation of the state under international law, according to which action must be taken to combat hate speech.

On the other hand, Decision No. 1006/B/2001. AB stated that "*gyűlöletkeltés*" (incitement to hatred) under the Radio and Television Broadcasting Act, 1996 (repealed) and "*gyűlöletre uszítás*" (instigation of hatred) under the Criminal Code bear one and the same meaning. Decision No. 165/2011. (XII. 20.) of the Constitutional Court also confirmed this interpretation. However, the Court did not analyse the relationship between the criminal law and media regulation standards either in 2007 or in 2011. The Constitutional Court has materially modified the constitutional interpretation of the crime of "incitement against a community" since 1992, and established a standard in 2004 and 2008, the application of which in practice is rather complicated and, for the purposes of media regulation, would make the application of the law nearly impossible.

The evolution of the application of the respective provisions of the Criminal Code and of the Radio and Television Broadcasting Act, 1996 (repealed)—which were declared to be identical by the Constitutional Court in 2007—thus followed entirely different paths. The jurisprudence of the Constitutional Court and the lower courts has been forming since 1992 (taking shape gradually), and gave a definition to incitement to hatred, according to which the application of the facts of the case in practice is difficult, and almost impossible, while the media authority (previously the National Radio and Television Commission, now the Media Council) took action against media service providers on a regular basis for incitement to hatred or exclusion, even if the person articulating his or her opinion would not had been liable under criminal law.

The Constitutional Court considered the constitutionality of the prohibition of incitement to hatred (and exclusion) under the Press Freedom Act in its decision No. 165/2011. (XII. 20.). Pursuant to the Decision, the obligation pertaining to the prohibition of the incitement of hatred against and the exclusion of communities may be constitutionally prescribed also with respect to press products. According to the Constitutional Court:

> [m]edia content denying the institutional values associated with fundamental rights is excluded by definition as an instrument for the development and maintenance of democratic public opinion. Such media content promoting views that are contrary to the values of democracy does not serve the democratic formulation of opinion and decision-making [statement of reasons, point IV. 2. 2. 1.].

However, this decision still does not mention the difficulties associated with the application of the different standards of incitement to hatred laid down in the Criminal Code and in the media regulations ("*uszítás*" v. "*gyűlöletkeltés*"). It should be also noted that—even if we assume that the two standards are identical—arguments in favour of parallel protection could be found; the reasons for such twofold regulation could be identified in the different structure of liability under criminal law and public administrative law, the different scope of those persons liable, and the different objectives of the different rules.

*4.2. "Exclusion"*

The constitutionality of the rules applicable to exclusion—which still form part of the media regulations—was considered by the Constitutional Court in its Decision No. 1006/B/2001. In relation to the prohibition of "exclusion" (and to the prohibition of the time concerning any "explicit or implicit offence"), the Court attempted to answer the questions concerning the reasons for the considerably lower level of restriction standards—compared to those pertaining to criminal law. In its response, the Court distinguished the sets of sanctions applicable under criminal law and public administrative law, and emphasised the importance of the impact of the "electronic press" on public opinions. What may be protected under the general freedom of expression (incitement of hatred against a community) is not necessarily covered by the freedom of the press. The decision mentions the significant opinion-forming power of the electronic media as another reason for the distinction, thus referring to Decision No. 1/2007 (I. 18.) AB:

> "it is generally accepted that the opinion-forming powers of radio and television broadcasting and the persuasive effects of animated images, audio and live coverage are many times more effective than the ability of other social information services to provoke thought." Further elaborating on this thought, the Decision states that "therefore the media are of critical importance for the existence of diversity of opinion, also serving as one of the most important stages for community debate; however, one must also take into account the fact that the broadcasting of programmes found to be offensive or exclusionary to, or discriminative against, persons or certain groups within society (whether minorities or the majority) may have similarly considerable negative effects of unforeseeable magnitude."

According to Decision No. 165/2011. (XII. 20.) AB, the obligation pertaining to the prohibition of incitement of hatred against and the exclusion of communities may be constitutionally prescribed also with respect to press products. While the decision does not mention specifically the provision on "exclusion" laid down in Article 17(2) of the Press Freedom Act, it is revealed by the operative part of and the statement of reasons for the decision that the Court still accepts this provision as constitutional. One might argue that the decision regards the provisions on "exclusion" as parts of the provisions on "incitement to hatred"—meaning that the latter implies the former—consequently the same constitutionality standards would apply to both sets of provisions. However, this interpretation is not elaborated clearly in the Constitutional Court decision of 2011; it might be only concluded from the fact that Article 17(2) of the Press Freedom Act was not specifically discussed in the decision. However, the media authority—in line with Decision No. 1006/B/2001. AB—associates more moderate acts with the term "exclusion" than those implied by the phrase of "incitement to hatred."

Messages that seek to achieve or argue in favour of the alienation or separation of a community from other layers of society are usually regarded as exclusive content. Such results may be reached by a programme if it is capable of enhancing or aims to enhance any stereotyped ideas or opinions that may exist in relation to a social group. Furthermore, media content may be regarded as exclusive, if the communicator seeks to somehow prevent the members of a community from exercising their constitutional rights or to place obstacles to the exercise of their rights. In the end, such attempts prevent the equal right to dignity of members of such communities from being effective and enforceable.

Content that violates human dignity is capable of falling within the scope of the prohibition of exclusion and *vice versa*; the provisions laid down in Articles 14(1) and 17(2) of the Press Freedom Act may be applicable separately as well. In theory, it is possible for a certain content to promote separation of a community within society without questioning its members' equal right to dignity (thereby without violating the right of the community to content that respects the value of dignity), or, on the other hand, certain content may question the right of a community to dignity without qualifying as exclusion.

### *4.3. The practice of the media authority*

Certain programmes of Tilos (means "forbidden" in Hungarian) Radio caused public outrage in 2003. One of the programmes—broadcast on Christmas Day—contained various insults to followers of the Christian religion, accompanied by the following statement: "First of all, I would like to exterminate all Christians." The National Radio and Television Commission (hereinafter: NRTC) imposed harsh sanctions on the station for violating various provisions, including the provisions on the protection of minors, of the Radio and Television Broadcasting Act. The broadcaster terminated the employment of the speaker on the show, but challenged the decision of the media authority in court. The Budapest Court of Appeal established the breach of law and maintained the decision of the National Radio and Television Commission (2.Kf.27.153/2004/7.).

Note that the National Radio and Television Commission held even less offensive statements to be offending in its practice. The liability of the media service provider was established for presenting Muslims in a "stereotyped, intolerant, and exclusive" manner [Decision No. 1512/2009. (VII. 20.) of the NRTC], broadcasting extreme criticisms of and presenting prejudiced opinions on the social role of homosexuals [Decision No. 2500/2009. (XII. 16.) of the NRTC], denigrating Socialist Members of Parliament [Decision No. 865/2008. (V. 22.) of the NRTC], or broadcasting overly generalised and simplified opinions of the "left-wing" [Decision No. 866/2008. (V. 22.) of the NRTC]. Similar was the situation regarding two talk-

shows, in which the Commission carried out a thorough and comprehensive review. In the end, the liability of the broadcasters was established as "presenting the actions of the aggressive and violent figures with the occasional tendency to take the law into their own hands was capable of stigmatising the Roma community," and the programmes enhanced the existing stereotypes and negative prejudices of society [Decisions No. 2502 and 2503/2009. (XII. 16.) of the NRTC].

On the other hand, an "alternative hip-hop song" broadcast by a broadcaster as part of its programme was found to be lawful, though it did contain expressions that insulted other nations, as—according to the Commission—"art is an experimenting form of expression, in permanent pursuit of reaching the boundaries of general taste. No significant works of art could be created if certain works that do not conform to the general taste would be denied publicity" [Decision No.2298/2009. (XII. 2.) of the NRTC]. A final decision of the Budapest Court of Appeal repealed Decision No. 1800/2005. (IX. 14.) of the NRTC, in which the Commission imposed a fine on RTL Klub for broadcasting a scene showing members of the Roma minority in a prejudicial manner (despite the intended humour of the scene). The court held that parodies may be subject to standards that are different from those applicable to other genres. As such, the contested parts were found to be lawful. According to this ruling, the artistic (whatever that means) or humorous nature of certain expressions can justify a more lenient approach toward the respective expressions.

For the purposes of deciding on the possible infringement, it was an important aspect for the media authority whether the presenter made any attempt to balance or moderate the extreme opinions—of a guest or text messages from the audience—that might appear in the programme under review. It could justify the liability of the media service provider if no attempt were made to this end [e.g. Decisions No. 1189/2007. (V. 23.) and 1266/2007. (V. 30.) of the NRTC].

It is safe to establish that, in general, the National Radio and Television Commission adopted relatively few decisions concerning the issues of incitement of hatred and hate speech (no such decision was passed between 1996 and 2002, and the liability of media service providers was established in 32 cases between 2002 and 2010, only two of which were not repealed in court with final effect).

In the course of adopting its decisions, the Media Council relies on the practice of its predecessor, the National Radio and Television Commission, and establishes legal liability on the basis of the prohibition of "incitement to hatred" for opinions that are capable of enhancing the stereotypes concerning certain communities, include unjust generalisations, or fail to respect the equality of individuals [e.g. Decisions No. 828/2011. (VI. 22.) and 1153/2011. (IX. 1.) of the Media Council].

## 5. The denial of the Holocaust and other cases of genocide

In 2010, the Hungarian Parliament adopted the inclusion of the crime of "Public Denial of the Holocaust" (Article 269/C) into the Criminal Code, thereby criminalising the act of denying the Holocaust. According to the Criminal Code, the crime is committed by persons who "violate the dignity of the victims of the Holocaust in public by denying or questioning the occurrence or belittling the significance of the Holocaust." This provision was never applied in practice, as the Parliament—after the change of the government—adopted fundamental amendments thereto in June of the same year. The title of the new part was changed to "Denial of the Crimes of The National Socialist and Communist Regimes." After the amendment, the crime was committed by persons who "publicly deny or question the

occurrence or belittle the significance of the genocides and other grave crimes against humanity committed by the National Socialist or Communist regimes."

Apparently, the word "Holocaust" was removed from the text, thereby making the provision applicable to the act of denying any genocide or other crime against humanity committed by the specified despotic regimes (including, of course, the Holocaust). The new text is in line with most of the "Acts on Denial" in the sense that it avoids mentioning the Holocaust specifically. On the other hand, it is clear that the amendment was made for symbolic political reasons (similar to its adoption, the amendment was not the result of any pressing or real social problem).

The new Criminal Code (2012) made certain amendments to the provisions of Article 269/C (Article 33 of the new Criminal Code). Firstly, the Hungarian phrase ("*emberiség elleni cselekmények*") used for "crimes against humanity" was replaced by another phrase ("*emberiesség elleni cselekmények*") expressing the meaning of the English phrase more precisely. Secondly, the amendment made the act of "attempting to justify such crimes" punishable, because—according to the reasoning of the rapporteur—"in addition to denial, the mere act of attempting to justify or legitimise such crimes poses in itself a danger to society."

> Article 333. A person who denies or questions the occurrence or belittles the significance of the genocides and other grave crimes against humanity committed by the National Socialist or Communist regimes, or attempts to justify such crimes in public, shall be liable to punishment for a felony offence by imprisonment for up to three years.