

Decision 30/1992 (V. 26.) AB

IN THE NAME OF THE REPUBLIC OF HUNGARY

On the basis of petitions seeking a posterior review of the unconstitutionality of a statute, the Constitutional Court has adopted the following

decision.

The Constitutional Court rejects the petitions seeking the determination of the unconstitutionality and the declaration of the nullification of Section 269 para. (1) of Act IV of 1978 on the Criminal Code (hereinafter: the CC).

The Constitutional Court holds that Section 269 para. (2) of the CC is unconstitutional and therefore nullifies it as from the date of publication of this Decision.

The Constitutional Court orders that the final judgements made in criminal proceedings conducted on the basis of Section 269 para. (2) of the CC be reviewed if the convicted person has not yet been relieved of the unfavourable legal consequences.

The Constitutional Court publishes its Decision in the Hungarian Official Gazette.

REASONING

I

1. The petitioners asked for declaring the unconstitutionality of, and for annulling the statutory definition found under Section 269 of Act IV of 1978 on the Criminal Code (the CC) as specified in Section 15 of Act XXV of 1989. In their opinion, Section 269 of the CC is unconstitutional on the ground of its ordering the punishment of types of conduct that fall within the scope of exercising the freedom of expression and the freedom of the press guaranteed in Article 61 of the Constitution, and – according to one of the petitioners – the freedom of thought specified under Article 60 and the right to asylum guaranteed in Article 65 of the Constitution.

2. The Central District Court of Pest suspended the procedure relating to a case with its Ruling No 6. B. X. 20.192/1991/28. with reference to Section 38 para. (1) of Act XXXII of 1989 on the Constitutional Court (the ACC). According to the ruling, the CC “seems to contradict” Article 8 paras (1)-(2) and (4) of the Constitution with regard to the provisions of Article 61 paras (1) and (2) thereof.

3. The president of the Supreme Court and the Prosecutor General spoke at the session of the Constitutional Court. In their opinion, Section 269 of the CC is not unconstitutional.

II

1. The definition of incitement against a community in the present Section 269 of the CC is given in Section 15 of Act XXV of 1989 on the amendment of the Criminal Code in the following manner:

“(1) A person who, in front of a large public gathering, incites hatred

a) against the Hungarian nation or any other nationality,

b) against any people, religion or race, further against certain groups among the population, commits a felony and is to be punished by imprisonment for a period of up to three years.

(2) Anyone who in front of a large public gathering uses an offensive or denigrating expression against the Hungarian nation, any other nationality, people, religion or race, or commits other similar acts, is to be punished for misdemeanour by imprisonment for up to one year, corrective training or a fine.”

2. During the regulatory history of the criminal rules investigated at present, both the scope of statutorily protected targets and the behavioural means of commission of the offence have been modified. What remains the same is the goal of the declaration of punishment: the statutory demarcation of the boundary where the freedom of expression – and the freedom of speech embodied in the former – ends and forms of behaviour prohibited by criminal law begin.

According to the provisions of Act V of 1878 on the Hungarian Criminal Code (Codex Csemegi) relevant to the statutory definition examined by the Constitutional Court, a person who at a meeting publicly and orally, or who by the distribution or public exhibition of a publication, writing or illustration incites any class, nationality or religion for the hatred of another is guilty of incitement [Section 172 para. (2)].

Act III of 1921 on the More Effective Protection of the Order of the State and Society provided for the punishment for misdemeanour of anyone who used an abusive expression or committed a similar act against the Hungarian State or Hungarian nation (Section 8).

Act VII of 1946 on the Criminal Law Protection of the Democratic Order of the State and the Republic replaced the provisions of Codex Csemegi by the statutory provisions on encouraging action and incitement against the democratic order of the State, the democratic republic, the freedom of citizens and the equality of rights. Act XLVIII of 1948 on the Elimination of Certain Deficiencies of Criminal Law Statutes and the Improvement thereof completed the statutory definition of libel against the democratic order of the state and the democratic republic with the criminal law protection of national, national minority, and religious feelings.

The “Official Compilation of Criminal Law Provisions in Force” (“BHÖ”, 1952) contained the essentially unchanged text of the statutory provisions of Act VII of 1946 and Act XLVIII of 1948 among the criminal offences against the internal security of the State.

Act V of 1961 on the Criminal Code modified at several points the regulation on incitement placed among felonies against the State. “Insult against a community” was introduced as a new criminal offence among the acts against public safety and public order. The Act provided for a less severe punishment of the acts specified in the statutory definition of incitement when – with due regard to all circumstances of the event, and in particular to the motivation of the act, the method of commitment and the perpetrator’s personal circumstances – the offence was of a minor weight.

It was the task of the judiciary to make a distinction between incitement and insult against a community. As such distinction was important not only as far as the degree of sanctioning was concerned but also for differentiating between criminal offences against the State and ordinary offences, more clear-cut criteria of distinction were proposed during the preparation of the new CC.

As a result, the offence of “incitement” regulated in the original Section 148 of Act IV of 1978 (the CC) became a purported criminal offence, i.e. it was not enough for the declaration of guiltiness that the perpetrator had been aware of the fact that his conduct could raise hatred against the legal subject specified in the statutory definition, but it was also necessary to establish that his intention had been expressly directed at the above, and that his conduct had been performed in order to achieve the desired goal.

In cases where the motivation of incitement to hatred was not established, the perpetrator was punishable for the same conduct as an insult against a community placed among the offences against public peace [original Section 269 para. (1)]. In addition, insult against a community included using, in front of others, an offensive or denigrating expression against the Hungarian nation and groups or persons, based on their nationality, religion, race, or socialist conviction, or committing other similar acts [original Section 269 para. (2)].

In 1989, in the interest of the creation of guarantees for the rule of law, criminal offences of a political nature received top priority among the regulations singled out for urgent modification. Act XXV of 1989 eliminated incitement from the category of crimes against the State and, with criminal liability significantly restricted, among the offences against public peace, it gave a new statutory definition for “incitement against a community.” The reduction of criminal liability resulted from narrowing the scope of the definition and from imposing the requirement of publication before a large audience.

3. The criminal codes of all democratic European countries having the continental legal system, as well as England and Wales, Canada and New Zealand, which have the Anglo-Saxon legal system, prohibit incitement on a “racial” basis in criminal law statutes. The demarcation of the boundary between incitement, arousal of hatred and expression of opinion remains hotly contested even internationally.

III

The petitions concerning the statutory definition of criminal offences in Section 269 para. (1) of the CC are unfounded. However, in light of the provisions of Article 8 paras (1) and (2) of the Constitution, Section 269 para. (2) of the CC restricts the freedom of expression and the freedom of the press guaranteed in Article 61 paras (1) and (2) of the Constitution to an unnecessary and disproportionate degree, therefore it is unconstitutional.

1. Upon comparing Section 269 of the CC with Article 60 para. (1) of the Constitution, one can conclude that the freedom of thought and incitement against a community have no points of connection. Thus, the criminal provision concerned does not restrict or violate that fundamental right, since it is related to the expression of one’s opinion. The challenged statutory definition provides for the punishment of a specific type of conduct. It is one of the axioms of criminal law that mere thoughts cannot serve as a basis for the establishment of criminal liability.

Similarly, there is no relation between the contents of Section 269 of the CC and the provision in Article 65 of the Constitution according to which the Republic of Hungary shall – in accordance with statutory conditions – secure the right of asylum to foreign citizens who, in their native country or to stateless persons who, in the country of their usual place of residence, are subject to persecution on the basis of their race, religion, nationality, language or political conviction. In the opinion of the Constitutional Court, obtaining asylum is conditional upon a well-founded fear of being persecuted because of the racial, religious, or national identity of the person concerned, or his belonging to a specific social group, or because of his political convictions, and it is not related to inciting hatred against the people of the country from which he fled, or using offensive or denigrating expressions about it. There is no relevant connection between the right to asylum as a fundamental constitutional right and Section 269 of the CC, therefore no contradiction between them can be established.

2.1. Section 269 para. (1) of the CC is a real restriction of the freedom of expression specified in Article 61 para. (1) of the Constitution and the freedom of the press guaranteed in para. (2) thereof, specifying their boundaries using criminal law sanctions as the most severe tools of the system of liabilities.

It is an important question regarding all constitutional fundamental rights whether or not they may be restricted and limited, and if so, on what terms, furthermore, on the basis of what criteria priority is to be determined in the case of their collision. As far as the freedom of expression, including the freedom of the press, is concerned, this issue is of primary importance as such freedoms are among the fundamental values of a pluralistic and democratic society.

Therefore, the freedom of expression has a special place among constitutional fundamental rights, in effect it is the “mother right” of several freedoms, the so-called fundamental rights

of communication. Enumerated rights derived from this “mother right” are the right to free speech and the right to the freedom of the press, with the latter encompassing the freedom of all media, as well as the right to be informed and the right to freely obtain information. In a broader sense, the freedom of expression includes artistic and literary freedoms, the freedom to distribute and disseminate works of art, the freedom of scientific research and the freedom to teach scientific knowledge. The respect and protection of the latter are expressly provided for by Article 70/G of the Constitution. Other rights related to the freedom of expression are the freedom of religion and conscience (Article 60 of the Constitution) and the right of assembly (Article 62).

It is this combination of rights that renders possible the individual’s reasoned participation in the social and political life of the community. Historical experience shows that on every occasion when the freedom of expression was restricted, social justice and human creativity suffered and humankind’s innate ability to develop was stymied. The harmful consequences afflicted not only the lives of individuals but also that of society at large, inflicting much suffering while leading to a dead end for human development. Free expression of ideas and beliefs, free manifestation of even unpopular or unusual ideas is the fundamental requirement for the existence of a truly vibrant society capable of development.

2.2. It is provided for in Article 8 of the Constitution that the Republic of Hungary recognises inviolable and inalienable fundamental human rights, and the respect and protection of these rights is a primary obligation of the State. The rules pertaining to fundamental rights and duties are determined by Acts of Parliament; such law may, however, not restrict the basic contents of fundamental rights.

The State may only use the tool of restricting a fundamental right if it is the only way to secure the protection or the enforcement of another fundamental right or liberty or to protect another constitutional value. Therefore, it is not enough for the constitutionality of restricting the fundamental right to refer to the protection of another fundamental right, liberty or constitutional objective, but the requirement of proportionality must be complied with as well: the importance of the objective to be achieved must be proportionate to the restriction of the fundamental right concerned. In enacting a limitation, the legislator is bound to employ the most moderate means suitable for reaching the specified purpose. Restricting the content of a right arbitrarily, without a forcing cause is unconstitutional, just like doing so by using a restriction of disproportionate weight compared to the purported objective.

As explained in the Constitutional Court’s Decision about the constitutional issues of abortion, the State’s obligation to “respect and protect” fundamental rights means more than merely abstaining from violating them; it also includes an obligation to guarantee the conditions necessary for their enforcement. People exercise their fundamental rights in line with their individual freedom and personal needs. To perform the State’s tasks guaranteeing the above, in addition to securing the individual subjective fundamental rights, the related actual values and situations of life as such must be protected by the State – not only in connection with individual claims – by handling them in the context of the other fundamental rights. For the State, the protection of fundamental rights is merely a part of maintaining and operating the entire constitutional order [Decision 64/1991 (XII. 17.) AB].

In addition to the right of the individual to the freedom of expression, Article 61 of the Constitution imposes the duty on the State to secure the conditions for the creation and maintenance of a democratic public opinion. The objective, institutional aspect of the right to the freedom of expression relates not only to the freedom of the press, freedom of education and so on, but also to that aspect of the system of institutions which places the freedom of expression, as a general value, among the other protected values. For this reason, the constitutional boundary of the freedom of expression must be drawn in such a way that in addition to the person’s subjective right to the freedom of expression, the formation of public

opinion, and its free development – being indispensable values for a democracy – are also considered.

Given that the subject of this enquiry is the restriction of the freedom of expression by the use of criminal sanctions, the constitutional demands imposed on the constitutional criminal system as a whole must be given effect. Such demands originate from the concept of constitutional criminal law, the system of consequences devolving upon the exercise of the State's punitive power based on the principle of the rule of law, and in particular, the limitations of content and the requirements of form of criminal law legislation.

Accordingly, when assessing the constitutionality of Section 269 of the CC, the Constitutional Court has examined whether:

- it is unavoidably necessary to restrict the freedom of expression and the freedom of the press in the case of the conducts specified in the statutory definition,
- the restriction complies with the requirement of proportionality, that is, whether the set of tools of criminal law in general and the statutory definition concerned in particular are necessary and adequate for the aim to be achieved.

The statutory definition provides for sanctions for two types of conduct: the raising of hatred (incitement to hatred), and the expression of contempt (use of offensive or denigrating expressions or commission of other similar acts). As the criminal offences specified under paragraphs (1) and (2) of Section 269 of the CC are significantly different, both in terms of the conduct constituting the offence and their dangerousness, the Constitutional Court has examined separately the constitutionality of the two types of conduct.

IV

With respect to the types of conduct rendered subject to criminal sanctions in Section 269 para. (1) of the CC, the Constitutional Court has established the following:

1. The potential harms resulting from incitement to hate, and from humiliating expressions of contempt for certain groups in a population are amply documented in the annals of human experience.

The power of words was noted already in the 1878 Codex Csemegi whose accompanying annotation by the Minister of Justice stated the following: “The free communication of ideas, to which mankind owes its greatest achievements, becomes just as dangerous as fire, which gives light and warmth, but which, when raging uncontrollably, very often becomes the cause of great misfortune, much suffering and destruction.”

The tragic historical experiences of our century prove that views preaching racial, ethnic, national or religious inferiority or superiority, the dissemination of ideas of hatred, contempt and exclusion endanger the values of human civilization.

It is proved both by history and by the events of our times that any utterance expressing an intention of raising hatred against a specific group of people can push social tension to extremes, disturb social harmony and peace, and in an extreme case, it can result in violent clashes between certain groups of society.

In addition to the historical and contemporary experiences proving the extreme damaging effects of raising hatred, one has to count with the everyday threats that result from the unlimited expression of ideas and concepts suitable for raising hatred. Such expression prevents the living together of human communities with other groups in a harmonic way. By intensifying emotional and social tensions within a smaller or bigger community, this can destroy ties within society, strengthen extremities, and increase prejudice and intolerance. All the above results in the diminution of the chances of creating a tolerant and multicultural society acknowledging pluralism and the right to be different, as well as accepting the equal dignity of all people, where discrimination is not regarded as a value.

2. To afford constitutional protection to the incitement of hatred against certain groups under the guise of the freedom of expression and freedom of the press would present an indissoluble contradiction with the value system and political orientation expressed in the Constitution: the democratic rule of law, the equality of human beings, equality of dignity, as well as the prohibition of discrimination, the freedom of religion and conscience, the protection of national and ethnic minorities – as recognised by the various Articles of the Constitution.

According to Article 2 para. (1) of the Constitution, the Republic of Hungary is a democratic state under the rule of law. Democracy is a very complex concept. As far as the issue under review is concerned, it is important that the contents of this concept include the right to be different, the protection of minorities, as well as waiving the right to use force and the threat of force as a tool of resolving conflicts.

Incitement to hatred is the negation of the aforementioned content, an emotional preparation for the use of violence. It is an abuse of the freedom of expression, it is such an intolerant classification of a group which is the characteristic of dictatorships, not democracies. To tolerate the exercise of the freedom of expression and the freedom of the press in a way prohibited under Section 269 para. (1) of the CC would contradict the requirements springing from the democratic rule of law.

According to Article 54 para. (1) of the Constitution, everyone has the inherent right to human dignity. Accordingly, human dignity may restrict the freedom of expression.

3. The necessity of restricting the freedom of expression and freedom of the press also follows from the international obligations of the Republic of Hungary. Pursuant to Article 7 para. (1) of the Constitution, the legal system of the Republic of Hungary accepts the generally recognised principles of international law, and secures the harmony of domestic law with the obligations assumed under international law. In respect of the issue under review, the international obligations in force are the following:

3.1. The freedom of thought (Article 18) and the right to freely express one's opinion (Article 19) are guaranteed in the International Covenant on Civil and Political Rights adopted at Session XXI of the General Assembly of the United Nations on 16 December 1966 and promulgated in Hungary in Law-Decree 8/1976.

According to Article 19:

“1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

a) for respect of the rights or reputations of others;

b) for the protection of national security or of public order (*ordre public*), or of public health or morals.”

Article 20 para. (2) contains a more direct position: “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”

3.2. The Republic of Hungary is bound by the International Convention on the Elimination of All Forms of Racial Discrimination, promulgated in Law-Decree 1/1969.

According to Article 4 of the Convention, the States Parties

“a) shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

b) shall declare illegal and prohibit organisations, and also organised and all other propaganda activities, which promote and incite racial discrimination, and shall recognise participation in such organisations or activities as an offence punishable by law;

c) shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.”

3.3. The European Convention for the Protection of Human Rights and Fundamental Freedoms does not contain a direct obligation for the States to have incitement declared as a criminal offence, instead, it regulates primarily the manner of restricting the right to the freedom of expression.

According to Article 10 of the Convention:

“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.”

Several decisions of the European Commission of Human Rights have established that according to Article 10 point 2, the prohibition of racist communication is considered to be a valid restriction of the freedom of expression.

As a summary of its position, the Constitutional Court points out that the restriction of the freedom of expression and the freedom of the press is necessitated and justified by the negative historical experiences connected to raising hatred against certain groups of people, by the protection of constitutional values, and by the obligation of the Republic of Hungary to comply with its commitments under international law.

4. Criminal law is the *ultima ratio* in the system of legal responsibility. Its social function is to serve as the sanctioning cornerstone of the overall legal system. The role and function of criminal sanctions, i.e. punishment, is the preservation of legal and moral norms when no other legal sanction can be of assistance.

It is a requirement of content following from constitutional criminal law that the legislature may not act arbitrarily when defining the scope of conducts to be punished. A strict standard is to be applied in assessing the necessity of ordering the punishment of a specific conduct: with the purpose of protecting various life situations as well as moral and legal norms, the tools of criminal law necessarily restricting human rights and liberties may only be used if such use is unavoidable, proportionate and there is no other way to protect the objectives and values of the State, society and the economy that can be traced back to the Constitution.

In the Constitutional Court’s view, the previously analysed impact on and consequences for an individual and society of the conduct prohibited by Section 269 para. (1) of the CC are so grave that other forms of responsibility, such as the application of liability for administrative infraction or the instruments of civil law, are inadequate for dealing with the perpetrators of such conduct. The emphatic expression of disapproval and condemnation of such behaviour, the fortification of those democratic ideas and values which are attacked by the perpetrators of these activities, and the restoration of the violated legal and moral order requires the application of the instruments of criminal law.

5. Finally, the question whether Section 269 para. (1) is restrained and provides an appropriate response to the phenomenon deemed undesired and dangerous must be looked into, that is,

whether this provision, in accordance with the authoritative requirement for restricting a constitutional fundamental right, confines itself to the narrowest possible scope to achieve its objective. Constitutional criminal law requires the disposition describing the conduct prohibited by threatening with a sanction in criminal law to be straightforward, well-defined and clear. It is a constitutional requirement to clearly express the intentions of the legislature concerning the protected legal subject and the conduct constituting the offence. It must contain a definite message on when the individual is considered to commit a breach of the law sanctioned under criminal law. At the same time, it must not give way to arbitrary interpretation of the law by those applying the law. Therefore, it must be examined whether or not the statutory definition delimits the scope of punishable conducts too broadly and whether it is definitive enough.

Section 269 para. (1) of the CC complies with the requirements raised in respect of restriction. As the historical review in point II/2 of the present Decision demonstrates, the 1989 amendment considerably narrowed the scope of offences incurring criminal liability, in a number of ways:

- The scope of offences was narrowed by the exclusion of constitutional order, as well as the State's alliances, friendship, co-operation or other international relations from the category of protected legal subjects. Accordingly, incitement to hatred against these institutions was eliminated from the category of criminal behaviour. The instruments of criminal law are only triggered if someone engages in a conduct qualifying as forceful changing of the constitutional order (Section 139 of the CC), conspiracy against the constitutional order (Section 139/A of the CC), rebellion (Section 140 of the CC) and treason (Section 141 of the CC), all of which require conducts going considerably beyond incitement to hatred.

- The more serious type of incitement to hatred as defined earlier, the commission of the incitement in front of a large public, became the basic definition of the offence of incitement against a community. On the one hand, this concept is defined under Section 137 item 10 of the Act. Pursuant to it, "it qualifies as commission in front of a large public gathering if the offence is committed through communication in the press or other mass media or by reproduction." On the other hand, the content of this concept has long been formed in the practice of the criminal courts.

Incitement against a community undoubtedly broadened the scope of criminal liability as compared to the original offence of incitement insofar that the new definition requires no intent, that is an express purpose is no longer required for the establishment of criminal liability and it is sufficient if the perpetrator is merely aware of the fact that his behaviour is capable of triggering hatred.

One phrase of the statutory definition requiring interpretation is that of "certain groups in the population." This expression reveals the intention to protect people with various views (members of political parties, societies, movements etc.), or individuals differentiated from others by virtually any criterion.

The conduct constituting the offence in the definition of incitement to hatred also requires interpretation. The words themselves convey generally understood meanings. Hatred is one of the most extreme negative feelings, defined by the Dictionary of the Hungarian Language (A Magyar Nyelv Értelmező Szótára Vol. 2, p. 1132) as an intense hostile emotion. One who incites provokes, encourages and urges hostile behaviour and hostile acts resulting in harm against some individual, group, organisation or measure (Dictionary of the Hungarian Language Vol. 7, p. 59). Given that in the Codex Csemegi incitement to hatred was already the conduct constituting the commission of the offence, when assessing concrete cases, the criminal courts can draw on more than a century of interpretative experience. The Curia [the Supreme Court] at the turn of the century defined the concept of incitement with great precision on a number of occasions (Büntetőjogi Döntvénytár (Crim. Law Reports) Vol. 7,

272.1): According to law, “incitement” is not the expression of some unfavourable and offensive opinion, but such a virulent outburst which is capable of whipping up such intense emotions in the majority of people which, upon giving rise to hatred, can result in the disturbance of the social order and peace. This way, criticism, disapproval, objections or even offensive declarations do not constitute incitement; incitement occurs only when the expressions, comments etc. do not address reason but seek to influence the world of emotions and are capable of arousing passion and hostile feelings. For the concept of incitement it is totally irrelevant whether or not the facts stated are true; what matters is whether the specific composition of data, no matter whether true or false, is capable of arousing hatred (Büntetőjogi Döntvénytár (Crim. Law Reports) Vol. 1 124. 1).

The more serious version of incitement against a community, the definition of incitement to hatred, therefore complies with the requirement of proportionality: it covers only the most dangerous conducts and can be unambiguously applied by the courts. The fact that the original definition in the Criminal Code permitted even in the recent past such a restriction on the freedom of expression which is not acceptable by the democratic value system is not an argument in itself for the unconstitutionality of the definition. It merely proves that precise legal definitions provide only a limited protection against the abuse of the instruments of criminal law. Real protection is provided by the operation of the institutions of the democratic State under rule of law, the genuine independence of the judiciary and the creation of a society committed to democratic values.

V

1. According to what has been said above, the right to the freedom of expression is not merely a subjective fundamental right, but the recognition of its objective, institutional aspect concurrently means the protection of public opinion as a fundamental political institution. Although the privileged place accorded to the right of freedom of expression does not mean that this right may not be restricted – unlike the right to life or human dignity which are absolutely protected – but it necessarily implies that the right to free expression must only give way to a few rights; that is, the Acts of Parliament restricting this freedom must be strictly construed. The laws restricting the freedom of expression are to be assigned a greater weight if they directly serve the realisation or protection of another subjective fundamental right, a lesser weight if they protect such rights only indirectly through the mediation of an “institution”, and the least weight if they merely serve some abstract value as an end in itself (public peace, for instance).

2. The behaviour defined as an offence punishable by law in Section 269 para. (1) of the CC is “incitement to hatred.” The definition of incitement contained in the Curia decision cited above makes it abundantly clear that such behaviour falls within this category which “is capable of whipping up such intense emotions in the majority of people which, upon giving rise to hatred, can result in the disturbance of the social order and peace.” The disturbance of the social order and peace - or “public peace”, to use the Criminal Code terminology - also contains the danger of a large-scale violation of individual rights: emotions whipped-up against a group threaten the honour and dignity (and in more extreme cases, also the lives) of the individuals comprising the group, and by intimidation restrict them in the exercise of their other rights as well (including the right to the freedom of expression). The behaviour criminally sanctioned in paragraph (1) poses a danger to individuals’ rights, too, which gives such a weight to public peace that – in line with the argumentation in point IV – the restriction of the freedom of expression can be regarded as necessary and proportionate. Although the actual outcome of the examination is the same, this 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 the freedom of expression. What is of

crucial importance here is the value that has become threatened: incitement endangers subjective rights also having prominent places in the constitutional value system.

In contrast, in the case of “using abusive language”, it is not an element of the statutory definition that the offensive expression or similar act be capable of disturbing public peace. In contrast with “incitement to hatred”, nor does the behaviour constituting the offence permit the drawing of such a conclusion. The Criminal Code assumes that the use of an expression offensive to a national or religious community is generally contrary to the desired peace of society. Thus, this statutory definition of the criminal offence amounts to an abstract protection of public order and peace as an end in itself. The criminal offence is committed even if under the given circumstances the utterance of the offensive statement does not result in even the threat of violating an individual right. Such an abstract threat to public peace is not a sufficient justification for the use of sanctions of criminal law to restrict the freedom of expression.

3. The right to free expression protects opinion irrespective of the value or veracity of its content. Only this approach meets the requirement of ideological neutrality expressed by the amendment of the Constitution by Act XL of 1990 through expunging from Article 2 of the Constitution the provision inserted in October 1989 – as a clear example of pluralism – which contained major ideological trends. The freedom of expression has only external boundaries: until and unless it clashes with such a constitutionally drawn external boundary, the opportunity and fact of the expression of opinion is protected, irrespective of its content. In other words, it is the expression of an individual opinion, the manifestation of public opinion formed by its own rules and, in correlation to the aforesaid, the opportunity of forming an individual opinion built upon as broad information as possible that is protected by the Constitution. The Constitution guarantees free communication – as individual behaviour or a public process – and the fundamental right to the freedom of expression does not refer to the content of the opinion. Every opinion, good and damaging, pleasant and offensive, has a place in this social process, especially because the classification of opinions is also the product of this process.

Everyone – including the State – may support opinions he finds agreeable or act against ones he deems incorrect, provided that in doing so he does not violate some other right to such an extent that the freedom of expression is forced to retreat. However, Section 269 para. (2) of the CC establishes not an external boundary but, in reality, classifies opinion on the basis of its content, and the disruption of public peace is related to this only as a hypothetical or a statistical probability.

It is a question of criminal law rather than one of constitutional law as compared to what an expression qualifies as offensive or denigrating. The message conveyed by certain words is so closely related to a given situation and cultural context (and it changes, too) that the abstract, hypothetical definition (“is capable of”) of disturbing public peace by using abusive language – in the absence of feedback on the actual disturbance of that peace – is a mere assumption which does not sufficiently justify the restriction of the freedom of expression. For in this case, the existence of an external boundary, i.e. the violation of another right, is itself uncertain. Accordingly, the examination of the unavoidability and proportionality of restricting the right to the freedom of expression is premature.

Moreover, “public peace” itself is not unrelated to the condition of the freedom of expression. Where one may encounter many different opinions, public opinion becomes tolerant, just as in a closed society an unusual voice may cause a much greater disruption of public peace. In addition, the unnecessary and disproportionate restriction of the freedom of expression reduces the openness of society.

The Constitutional Court takes note of the historical circumstances of individual cases. A change of political system is inevitably accompanied by social tensions. These tensions are

undoubtedly exacerbated if people can give vent with impunity before the public to their hatred, enmity and contempt of certain groups.

But the unique historical circumstances give rise to another effect and it is precisely for this reason that a distinction must be made between incitement to hatred and the use of offensive or denigrating expressions. The term “public at large” – apart from meetings – practically means the press. With the freedom of the press having become a reality no-one speaking out publicly may invoke external compulsion, and with every line penned he gives himself and risks his entire moral credibility. Only through self-cleansing can a political culture and a soundly reacting public opinion emerge. Thus one who uses abusive language stamps himself as such and in the eyes of the public he will become known as a “mudslinger.” Such abusive language must be answered by criticism. The prospect of a large amount of compensation is also part of this process. However, criminal sanctions must be applied in order to protect other rights and only when unavoidably necessary, and they should not be used to shape public opinion or the manner of political discourse, the latter approach being a paternalistic one.

4. For the aforementioned reason, Section 269 para. (2) of the CC is unconstitutional, and therefore the Constitutional Court nullifies it. For the maintenance of public peace the application of criminal sanctions for public utterances, or similar acts, offending, disparaging or denigrating the Hungarian nation, other nationalities, peoples, religion or race is not unavoidably necessary. This statutory definition unnecessarily and, in light of the desired objective, disproportionately restricts the right to the freedom of expression. The abstract and hypothetical threat to public peace does not, in itself, sufficiently justify criminal law restriction by Section 269 para. (2) of the fundamental right to the freedom of expression, a right whose exercise is indispensable for the functioning of a democratic state under the rule of law.

According to the Constitutional Court’s Decision, the dignity of communities can be a constitutional limit to the freedom of expression. Thus, the Decision does not exclude the possibility for the legislature to extend the scope of criminal sanctions beyond incitement to hatred. Nonetheless, there are other means available, such as expanding the possible use of non-material damages, to provide effective protection for the dignity of communities.

5. The review of criminal proceedings in which final judgments have been passed on the basis of Section 269 para. (2) of the CC has been ordered on the basis of Section 43 para. (3) of the ACC.

Dr. László Sólyom

President of the Constitutional Court

presenting Judge of the Constitutional Court

Dr. Antal Ádám

Judge of the Constitutional Court

Dr. Géza Kilényi

Judge of the Constitutional Court

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