DECISION 14/2000 (V. 12.) AB

IN THE NAME OF THE REPUBLIC OF HUNGARY

In the matter of petitions seeking a posterior review of the unconstitutionality of a statute, the Constitutional Court – with a concurrent reasoning by dr. András Holló, Judge of the Constitutional Court, and a dissenting opinion by dr. István Kukorelli, Judge of the Constitutional Court – has adopted the following

decision:

The Constitutional Court rejects the petitions seeking the establishment of the unconstitutionality and the annulment of Section 269/B of Act IV of 1978 on the Criminal Code, and it rejects the petitions alleging the collision of Section 269/B para. (1) with an international treaty.

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

Reasoning

I

Several petitions were filed for reviewing the constitutionality of Section 269/B of Act IV of 1978 on the Criminal Code (hereinafter: the CC). The Constitutional Court consolidated the petitions and judged them in a single procedure.

Most of the petitioners challenged the provisions that declare it a criminal offence to distribute, use or exhibit in public the hammer and sickle, the five-pointed red star and symbols depicting the same. One of the petitioners asked for declaring the unconstitutionality of, and for annulling, the whole statutory definition; challenging also, at the same time, the parts related to the swastika, the SS sign and the arrow-cross.

According to the petitioners, the challenged provision of the CC is contrary to the freedom of establishing a political party specified in Article 3 para. (1), the freedom of thought, conscience and religion declared in Article 60 paras (1) and (2), and the provision on a two-third majority contained in Article 60 para. (4) of the Constitution. In their opinion, the provision in question violates the fundamental right to the freedom of expression, specified in Article 61 para. (1), as well.

The petitioners allege that the legislature, by ordering the criminal prosecution of certain symbols only, qualified by the legislature as despotic ones, constitutes discrimination between persons on the basis of religion, political or other opinion, thus violating Article 70/A paras (1) and (2) of the Constitution. At the same time, the CC provision in question violates Article 70/G para. (2) of the Constitution as well, providing that only scientists are entitled to decide on questions of scientific truth.

Several petitioners went into details explaining that the challenged provisions were contrary to the international law and international treaties binding for the State of Hungary, and in particular the articles defined by the petitioners in the International Covenant on Civil and Political Rights adopted by the General Assembly of the United Nations on 16 December 1966 and promulgated in Hungary in Law-Decree 8 of 1976 (hereinafter: the Covenant), the Universal Declaration of Human Rights, and the Convention on the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and promulgated in Hungary in Act XXXI of 1993 (hereinafter: the Convention).

II

1. The constitutional provisions referred to by the petitioners are the following:

“Article 3 (1) In the Republic of Hungary political parties may be established and may function freely, provided they respect the Constitution and laws established in accordance with the Constitution.”

“Article 60 (1) In the Republic of Hungary everyone has the right to the freedom of thought, freedom of conscience and freedom of religion.

(2) This right shall include the free choice or acceptance of a religion or belief, and the freedom to publicly or privately express or decline to express, exercise and teach such religions and beliefs by way of religious actions, rites or in any other way, either individually or in a group.
(4) A majority of two-thirds of the votes of the Members of Parliament present is required to pass the law on the freedom of conscience and religion."

"Article 61 (1) In the Republic of Hungary everyone has the right to freely express his opinion, and furthermore, to have access to, and distribute information of public interest.
(2) The Republic of Hungary recognizes and respects the freedom of the press.
(3) A majority of two-thirds of the votes of the Members of Parliament present is required to pass the law on the public access to information of public interest and the law on the freedom of the press.
(4) A majority of two-thirds of the votes of the Members of Parliament present is required to pass the law on the supervision of public radio, television and the public news agency, as well as the appointment of the directors thereof, on the licensing of commercial radio and television, and on the prevention of monopolies in the media sector.

Article 70/A (1) The Republic of Hungary shall respect the human rights and civil rights of all persons in the country without discrimination on the basis of race, colour, gender, language, religion, political or other opinion, national or social origins, financial situation, birth or on any other grounds whatsoever.
(3) The Republic of Hungary shall endeavour to implement equal rights for everyone through measures that create fair opportunities for all.

Article 70/G (1) The Republic of Hungary shall respect and support the freedom of scientific and artistic expression, the freedom to learn and to teach.
(2) Only scientists are entitled to decide in questions of scientific truth and to determine the scientific value of research.

2. Act XLV of 1993 on the amendment of Act IV of 1978 on the Criminal Code introduced the following provision into the CC under the title "Use of Symbols of Despotism":

"Section 269/B (1) Anyone who

a) distributes;
b) uses in front of a large public gathering;
c) exhibits in public
a swastika, the SS sign, an arrow-cross, the hammer and sickle, a five-pointed red star or a symbol depicting the above commits a misdemeanour - unless a graver crime is realised - and shall be punishable with fine.
(2) The person who commits an act defined in paragraph (1) for the purposes of disseminating knowledge, education, science, or art, or for the purpose of information about the events of history or the present time shall not be punishable.
(3) The provisions of paragraphs (1) and (2) do not extend to the official symbols of states in force."

The justification for adopting the above statutory definition of criminal offence is found in the preamble of the Act of Parliament in question. It points out that in Europe and in Hungary the extremist political theories of the 20th century created, through the forced grabbing and the exclusive possession of power, dictatorships that neglected human rights and led to the mass execution of Hungarian citizens. The use of the symbols of states, organisations and movements that have adopted such extremist theories tears up aching wounds and is irreconcilable with the constitutional values of Hungary.

In line with the provisions of the preamble and Section 1 of the Act, the new criminal offence is placed in the chapter on criminal offences against public order, among the offences committed against public peace.

The reasoning of the draft of the Act proposed the punishment of the conducts specified in the statutory definition because "the survival and the re-use of various extremist (Fascist and Bolshevik) symbols revolts the significant majority of the society and hurts their legitimate sensitivity. At the same time, the conducts described in the draft Act derogate from the international reputation of Hungary, too."

3. The petitioners also referred to the violation of Article 19 of the Covenant and Article 10 of the Convention.

According to Article 19 of the Covenant:

“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 10 of the Convention contains the following provisions:

“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.

III

The Constitutional Court found the petitions unfounded on the following grounds:

1. Article 3 para. (1) of the Constitution defines and constitutionally protects the freedom to establish and operate political parties as a fundamental right specifically mentioned among the general provisions. This provision, however, guarantees the free operation and the constitutional protection of the political parties in the framework of the Constitution and the

constitutional laws only. Consequently, restricting the operation of political parties on the basis of statutory rules does not, in itself, violate the relevant provision of the Constitution [Decision 24/1992 (IV. 21) AB, ABH 1992, 126, 128].

In the opinion of the Constitutional Court, the penalisation of using symbols of despotism is not in a direct constitutional relation with the freedom to establish and operate political parties and, therefore, it does not violate Article 3 para. (1) of the Constitution.

2. Nor does Section 269/B of the CC violate the freedoms defined in Article 60 of the Constitution.

This provision of the CC does not restrict the freedom of religion as the symbols listed in the statutory definition are of a political rather than a religious nature. The provision concerned does not violate the freedom of thought and the freedom of conscience either, as the statutory provision in question orders the punishment of a certain conduct; it is an axiom of criminal law that criminal liability may not be founded merely on thoughts or conscience.

According to the practice of the Constitutional Court, the fundamental right to the freedom of conscience covers religious, moral or any other convictions, including political ones [Decision 46/1994 (X. 21.) AB, ABH 1994, 260, 270]. The fundamental right to the freedom of conscience is interpreted by the Constitutional Court as a right to the integrity of personality: the State may not compel anyone to accept a situation which sows discord within, or is irreconcilable with, the fundamental convictions which mould that person's identity [Decision 64/1991 (XII. 17.) AB, ABH 1991, 297, 313]. However, the conduct of committing the offence examined, i.e. the distribution, using in front of a large public gathering, and public exhibition of symbols with political significance, may not be generally regarded as one expressing a fundamental conviction which moulds the perpetrator's identity. Therefore, the statutory definition of the CC under review does not result in restricting the right to the freedom of conscience either.

It is the externally oriented use of the symbols concerned rather than the perpetrator's internal identification therewith that is prohibited by law, as the use of such symbols falls into the scope of expressing one's opinion to be dealt with by the Constitutional Court below.

3. In the opinion of the Constitutional Court, the challenged provision of the CC is not in a direct constitutional relation with the right to the freedom of scientific life and the question of deciding in scientific truth as specified in Article 70/G of the Constitution. The freedom of scientific life includes the freedom of scientific research and the freedom of disseminating scientific truth and knowledge related in a broader sense to the freedom of expression and, at the same time, it contains the State's obligation of respecting and securing the total independence of scientific life, as well as the cleanness, evenness and impartiality of science [Decision 34/1994 (VI.24) AB, ABH 1994, 182, 183.]. Taking into account the above reasons, the challenged provision of the CC does not violate Article 70/G of the Constitution, as Section 269/B para. (2) is, in fact, a guarantee of exercising such rights.

4. Section 269/B of the CC does not violate the prohibition of discrimination defined in Article 70/A para. (1) of the Constitution either. In particular, there is no violation of the prohibition of discrimination in the aspect raised by the petitioners, i.e. that the CC punishes the use of symbols specified in the statutory definition only, but not the use of other symbols of despotism. The statutory definition in question does not make a difference between persons on the basis of their political convictions, since it prohibits the use of symbols of despotism in general, as applicable to anyone independently from his or her political conviction, defining symbols as despotic ones related to both Fascist despotism and Communist despotism.

At the same time, it is pointed out by the Constitutional Court that not only do such symbols of despotism represent the despotic regimes known and suffered by the general public, but it has from the very beginning been reflected in the legislation of the Republic of Hungary that the unlawful acts committed by such regimes should be addressed together, be that offering remedies for the consequences of unlawful acts – for example, compensation for the damage unjustly caused by the State to the property of citizens or compensation granted to those illegally deprived of their lives and liberty for political reasons – or the symbolic condemnation of the participation in the express and typical despotic actions of such despotic regimes, in the framework of the so-called Lustration Act.

The Constitutional Court has expressly confirmed in its decisions related to the unlawful acts mentioned above that no constitutional concern may be raised against the equal evaluation and joint regulation of such despotic regimes. In the case of compensation for property, Decision 28/1991 (VI. 3.) AB contains all the above (ABH 1991, 88, 102). As far as

compensation for the deprivation of life and liberty is concerned, the Constitutional Court established in a separate procedure in the framework of a theoretic interpretation of the Constitution that the equal treatment of the victims of the despotic regimes in question is not merely in line with the Constitution but "there is no need and, in a system of compensation based on the injuries caused, no legal possibility for making a comparison – which is in any case infeasible, contradicting human dignity as well – as to whether different kinds of compensation should be given for deaths in a Nazi death camp, in a Soviet Gulag or in the cellar of the ÁVH [State Defence Authority in Hungary]." [Decision 22/1996 (VI. 25.) AB, ABH 1996, 89, 101] In the constitutional review of the Act on Monitoring Persons Holding Certain Key Positions, the Constitutional Court found it constitutional that the Act applies the same rules – justified by the fact that all the activities in question violated the grounds of the rule of law – to those who were members of the former state security organisations and those who made use of information supplied thereby, to the former members of the Arrow-Cross Party as well as to those who participated in the paramilitary forces in 1956-57 [Decision 60/1994 (XII. 24.) AB, ABH 1994, 342, 356].

Addressing the petitions alleging the discriminative nature of the Act, the Constitutional Court points out the following as well. In the decades before the democratic transformation, only the distribution of Fascist and arrow-cross symbols had been prosecuted by means of criminal law. At the same time, resulting reasonably from the nature of the political regime, the use of symbols representing the Communist ideas had not been punished; on the contrary, they were protected by criminal law. In this respect, the Act does, indeed, eliminate the former unjustified distinction made in respect of symbols of despotism.

Therefore, the Constitutional Court finds no reason with respect to the provision of the CC under review to make any difference between the despotic regimes equally condemned by the public opinion either.

5. According to the Constitutional Court, it was not necessary to adopt Section 269/B of the CC by a majority of two-thirds of the Members of Parliament present. Article 60 para. (4) of the Constitution referred to by the petitioners only requires a two-third majority for adopting an Act on the freedom of conscience and religion. As far as the freedom of expression is concerned, the Constitution only requires a qualified majority for adopting Acts on public access to information of public interest, on the freedom of the press, and on certain issues

related to the public radio, television and the public news agency [Article 64 paras (3) and (4)]. The Criminal Code may be adopted or modified by the votes of a simple majority of the Members of Parliament present. In the case of such a subject of legislation, no so-called qualified majority is prescribed in the Constitution.

IV

1. The distribution, using in front of a large public gathering, or the public exhibition (hereinafter: use) of the symbols of despotism specified in Section 269/B of the CC are particular forms of expressing one's political opinion. Consequently, the statutory provision prohibiting such well-defined acts does restrict the fundamental right to the freedom of expression.

In determining the statutory definitions of criminal offences, the legislature necessarily differentiates between conducts when, among the acts dangerous to the society, it selects the ones which shall made subject to the most severe liability system, i.e. the tools of criminal law. In this process, however, the legislature may not act arbitrarily: the essential and formal requirements of constitutional criminal law shall be enforced.

According to Article 8 para. (2) of the Constitution, although the laws regulating fundamental rights may not impose any limitation upon the essential contents of the fundamental right, the practice thereof may be restricted.

The Constitutional Court presented its opinion on the constitutional conditions of restricting the freedom of expression especially by measures of criminal law in several of its decisions, and primarily in Decision 30/1992 (V. 26.) AB (ABH 1992, 167, hereinafter: the CCDec.).

According to the CCDec. "the right to the freedom expression has a special place among constitutional fundamental rights, amounting in effect to the "mother right" of 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 the freedom of information – the right to be informed and to receive 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. 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 which 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. A free expression of ideas and beliefs as well as a free manifestation of even unpopular or unusual ideas are fundamental requirements for the existence of a truly vibrant society capable of development" (ABH 1992, 167, 170-171).

The CCDec. gives a guidance to the constitutional conditions of restricting a particularly protected fundamental right as well as to the constitutional limits of such a restriction.

The conduct of committing the offence specified in the statutory provision reviewed in the CCDec. gave rise to hatred (incitement to hatred) and mudslinging (the expression of contempt). Then the Constitutional Court examined whether:
– it was unavoidably necessary to restrict the freedom of expression and the freedom of the press in case of the conducts specified in the statutory definition,
– the restriction complied with the requirement of proportionality, namely, whether the set of tools of criminal law were necessary and adequate for the aim to be achieved both in general terms and in respect of the statutory definition of criminal law concerned.
According to the above mentioned decision of the Constitutional Court, "to afford constitutional protection to the incitement of hatred against certain groups under the guise of the freedom of expression and the 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, the equality of their dignity, as well as the prohibition of discrimination, the freedom of religion and conscience, and the protection and recognition of national and ethnic minorities, provided for in the various Articles of the Constitution" (ABH 1992, 167, 173). Therefore, the Constitutional Court rejected the petition challenging the rule prohibiting the expression giving rise (incitement) to hatred specified in Section 269 para. (1) of the CC.

However, the above mentioned decision of the Constitutional Court established the unconstitutionality of the rule prohibiting the expression of contempt specified in Section 269 para. (2) of the CC. According to the decision, "for the maintenance of public peace, the application of criminal sanctions for the public utterance, or a similar conduct, 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. An abstract and hypothetical threat to public peace is, in itself, insufficient to justify the criminal regulation and restriction by Section 269 para. (2) of the CC of the fundamental right to the freedom of expression - a right the exercise of which is indispensable for the functioning of a democratic state under the rule of law" (ABH 1992, 167, 180-181).

It was also pointed out in the decision that "offending public peace by "mudslinging" 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 necessity and unavoidability 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 instigate a much greater disruption of public peace. In addition, an unnecessary and disproportionate restriction of the freedom of expression reduces the openness of society." (ABH 1992, 167, 180)

When declaring the unconstitutionality of Section 269 para. (2) on the grounds of the above reasoning, the Constitutional Court also pointed out that "the dignity of communities may be a constitutional limit to the freedom of expression. Thus, the decision does not pre-empt the legislature's ability to extend the scope of criminal sanctions beyond incitement to hatred. Nonetheless, there are other means available, too, such as expanding the possible use of moral damages, to provide effective protection for the dignity of communities." (ABH 1992, 167, 181)

As far as the assessment of the present case is concerned, the essential statements interpreting the fundamental right to the freedom of expression and the constitutional limitations thereof

made in the above decision are to be followed, bearing in mind the fact that the conducts of committing the offence specified in Section 269/B para. (1) under review in the present case make it necessary to apply other aspects of examination and assessment, too.

In the opinion of the Constitutional Court, some conclusions may be drawn from the above concerning the examination of Section 269/B of the CC. One of such conclusions is that restricting the freedom of expression by measures of criminal law is also possible in case of statutory definitions other than that of incitement to hatred.

The constitutional limitations of such restriction are marked, on the one hand, by incitement to hatred and, on the other hand, by offending expressions or similar activities merely capable of disturbing public peace as conducts constituting the offence. Accordingly, a conduct endangering public peace by offending the dignity of communities may constitutionally be subject to restriction by criminal law, in a scope wider than the statutory definition of incitement to hatred but narrower than that of mudslinging.
Consequently, the limit of constitutionally acceptable restriction 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.
According to the above, the Constitutional Court has always acknowledged that disrupting public peace to a certain degree may justify restriction of the right to the freedom of expression. In such cases, public peace may be subject to criminal law protection.
The scope of protection is another issue, as it may only be decided on a case-by-case basis what level of disrupting public peace may constitutionally justify restriction of the freedom of expression [Decision 30/1992 (V. 26.) AB, ABH 1992, 167].
It is therefore clear that the concepts elaborated in the CCDec. are to be applied differently in case of statutory definitions that are narrower and more definite than the one assessed in the CCDec., such as the statutory definition examined in the present case.

2. In examining the constitutional problem of restricting the freedom of expression, the Constitutional Court has also taken into account the provisions of the Convention. According to Article 10 of the Convention, this right may be subject to restriction if it is “necessary in a democratic society”.

Article 19 (3) of the Covenant also acknowledges the possibility of restriction by law for the respect of the rights or reputations of others and for the protection of national security or of public order, public health or morals.

The Convention (as well as the practice of the European Court of Human Rights) offers for the State Parties broad discretion in deciding what qualifies as restriction "necessary in a democratic state" (Barfod, 1989; Markt Intern, 1989; Chorherr, 1993; Casado Coca, 1994; Jacubowski, 1994).

In exercising this right of discretion, the individual States shall take into account in particular the constitutional values protected by the Constitution as well as the relevant historical situation.

In several of its early decisions, the Constitutional Court included the historical situation into the scope of constitutional review as a relevant factor [Decision 28/1991 (VI. 3.) AB, ABH 1991, 88; Decision 11/1992 (III. 5.) AB, ABH 1992, 77].

In Decision 4/1993 (II. 12.) AB (Settlement of the Ownership of Real Estates Formerly Owned by Churches), it was partly the evaluation of the particular circumstances prevailing at the time when the political regime was changed (in the given case, the function of qualified majority) that served as a factual ground for refusing the petitions challenging the Act on the Settlement of the Ownership of Real Estates Formerly Owned by Churches which alleged the unconstitutionality of the Act reviewed on the basis of not being adopted by the Parliament with more than two-thirds of the Members of Parliament present (ABH 1993, 48).

In Decision 15/1993 (III. 12.) AB (summing up former decisions made by the Constitutional Court on compensation), the Constitutional Court repeatedly confirmed that it had examined the constitutionality of the Compensation Act since the second decision on compensation in the context of the change in the political regime. It was repeatedly pronounced by this decision that the particular situation prevailing at the time when the political regime was changed may be taken into account by the legislature (ABH 1993, 112).

In its decisions so far the Constitutional Court has consistently assessed the historical circumstances (most often the change in the political regime taken as a fact) by

acknowledging that such circumstances may necessitate some restriction on fundamental rights, but it has never accepted any derogation from the requirements of constitutionality on the basis of the mere fact that the political regime has been changed. Legislation justified by the change in the political regime as well as the restrictions contained in such laws have had to remain within the limits of the Constitution in force. Decisions on rendering justice apply the same method. All Acts on rendering justice have tried to solve the same problem while using different legal concepts and, therefore, their constitutional judgements have differed as well. Finally, the Act which has succeeded in finding a solution within the limits of the Constitution has been found constitutional.

The CCDec. Itself, too, took into account the historical situation, including the social tensions resulting from the circumstances of the change in the political regime when it stated the following: "The recent change of the political system is … 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." (ABH 1992, 167, 180)

The Constitutional Court points out that even the practice of the European Court of Human Rights (hereinafter: the Court) takes into account the specific historical past and present of the defendant State when it assesses the accepted aim and the necessity of restricting the freedom of expression.

In the case "Rekvényi vs Hungary" on restricting the political activities and the freedom of political debate of policemen, the Court passed its judgement on 20 May 1999 stating that "the objective that the critical position of the police in the society should not be compromised as a result of weakening the political neutrality of its members is an objective that can be accepted in line with democratic principles. This objective has special historical significance in Hungary due to the former totalitarian system of the country where the State relied greatly on the direct commitment of the police forces to the ruling party." (Court Reports 1999/12, 950-958)

The Court explained that for the purposes of Article 10 (2) of the Convention, the term "necessary" presumes the existence of a certain "pressing social need". The Court had to examine the challenged measure in light of the whole case, and to decide whether the intervention was "proportionate to the lawful objective to be achieved" and whether the

causes justifying the intervention were “relevant and adequate”. The Court acknowledged that “taking into account the particular history of certain State Parties, the national authorities of such States may – for the purpose of reinforcing and maintaining democracy – deem necessary constitutional guarantees that aim to achieve the desired objective [the existence of a politically neutral police] by restricting the political activities of policemen, and in particular, their freedom of political debate.”
The Court acknowledged that “between 1949 and 1989, Hungary was led by a single political party. Being a member of the party was expected in many spheres of society, and this expectation was even more express … in the police forces where most of the staff members were members of the party to guarantee the direct enforcement of the will of the ruling party. The rules on the political neutrality of the police aim to prevent this defect. The institutions of a pluralist democracy were set up by the Hungarian society only in 1989, leading in 1990 – after more than 40 years – to parliamentary elections in a multi-party system.” ...
“Having regard to the discretionary right allowed to the national authorities in this regard, the Court has found that, especially in the light of the historical background, the measures taken in Hungary with the aim of protecting the police from the direct influence of partisan politics are considered in a democratic society as a response to a “pressing social need”.

3. The freedom of expressing one’s opinion is not only a subjective right but also a guarantee of the free expression of various opinions shaping publicity.
Although this right is not unrestrictable, it enjoys special protection due to its primary role, and thus it may only be restricted in relation to a few other rights. Therefore, secondary theoretical values such as public peace enjoy less protection than the right concerned.

The Constitutional Court established that Section 269/B of the CC is placed in the structure of the Act among the offences against public peace. The direct aim of the Act – and at the same time, the subject of criminal law protection – is the protection of public peace, similar to Section 270 (scare-mongering) and Section 269/A (defamation of national symbols) of the CC.

However, in respect of the conduct constituting the offence, the protected legal subjects identifiable as such in a constitutional sense, the subject of the criminal offence, the consequences of perpetration as well as the definitive nature of the statutory definition, the statutory definition in Section 269/B of the CC under review significantly differs from both

scare-mongering (Section 270 of the CC) and the defamation of national symbols (Section 269/A of the CC) as the unconstitutionality of the latter provisions have also been reviewed by the Constitutional Court.

In the constitutional review of the statutory provisions challenged by the petition, the Constitutional Court applied the principles pointed out in its Decision 763/B/1995 AB (on the defamation of national symbols).

The Constitutional Court establishes that the limitations on the use of symbols of despotism are provided in an Act of Parliament (Section 269/B of the CC). According to the Constitutional Court, this statutory provision is accurate and its contents are determined well enough to allow the citizens to make their behaviours compliant with the law.

In the practice of the Constitutional Court, conducts endangering public peace and offending the dignity of communities may be subject to criminal law protection if they are not against an expressly defined particular person; theoretically, there is no other – less severe – tool available to achieve the desired objective than criminal sanction.

Similar to the right to life, the right to human dignity is protected in the Constitution to the same extent. The Republic of Hungary is an independent democratic state under the rule of law [Article 2 para. (1) of the Constitution]. „That Hungary is a State governed by the rule of law is both a statement of fact and a statement of policy" [Decision 11/1992 (III. 5.) AB, ABH 1992, 77]. Being a democracy under the rule of law is closely related to maintaining and operating the constitutional order [Decision 36/1992 (VI. 10.) AB, ABH 1992, 207]. The Constitution is not without values but it has a set of values. Expressing opinions inconsistent with the constitutional values is not protected by Article 61 of the Constitution.

According to Article 2 para. (3) of the Constitution, no activity of any social organisation, state authority or citizen may be directed at the forcible acquisition or exercise of public power, or at the exclusive possession of such power. Everyone shall have the right and obligation to resist such activities in such ways as permitted by law.

The Constitution belongs to a democratic state under the rule of law, and therefore, the constitution-making power has considered democracy, pluralism and human dignity

constitutional values worth protecting, and at the same time, it makes unconstitutional any activity directed at the forcible acquisition or exercise of public power, or at the exclusive possession thereof [Article 2 para. (3)]. Section 269/B orders the punishment of distributing, using in front of a large public gathering, and exhibiting in public symbols that were used by political dictatorial regimes; such regimes committed unlawful acts *en masse* and violated fundamental human rights. All of these symbols represent the despotism of the State, symbolising negative political ideas realised throughout the history of Hungary in the 20th century, expressly prohibited in Article 2 para. (3) of the Constitution and made everyone's obligation to resist such activities.

Taking into account what has been explained above, protecting public peace, "preventing disorder" in the given historical situation, and protecting the rights of others are objectives which are in line with the Convention. According to Article 10 (2) of the Convention, exercising the freedom of expression may be subject to such restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of public safety, for the prevention of disorder or crime, or for the protection of the rights of others.

Using the symbols the way as prohibited in Section 269/B of the CC can cause a reasonable feeling of threat and fear based on concrete experience in persons – including their various communities – who suffered injuries in the past, as such symbols represent the risk of having such inhuman acts repeated in connection with the totalitarian ideas concerned.

In the opinion of the Constitutional Court, if – in addition to the subject thus protected by criminal law – the protection of other constitutional values cannot be achieved by other means, criminal law protection itself is not considered to be disproportionate; provided that it is necessary to have protection against the use of such symbols. Whether or not it is necessary to have such protection in a democratic society depends on the nature of restriction, its social and historical contexts, and its impact on the persons affected.

Based on the above, in the present case, the statute under review serves the purpose of protecting other constitutional values in addition to the protected subject defined in criminal law. Such values are the democratic nature of the State under the rule of law mentioned in Article 2 para. (1) of the Constitution, the prohibition defined in Article 2 para. (3), as well as

the requirement specified in Article 70/A of the Constitution stating that all people shall be treated by the law as persons of equal dignity [Decision 9/1990 (IV. 25.) AB, ABH 1990, 46].

4. The Constitutional Court examined the challenged provision in terms of the scope of prohibited conducts concerning the use of symbols.

The conducts of committing the offence as enumerated in Section 269/B of the CC reflect a specific relation to the ideas represented by the symbols and connected to the forcible acquisition or dictatorial exercise of public power; this relation is essentially characterised by identification with, and the intention to propagate, the Nazi and Bolshevik ideologies that justified genocides and the forcible acquisition and exercise of public power.

Symbols are signs or images identifying an idea, a person or an event with the purpose of establishing a link between the sign and the symbolised ideas, persons or events on the basis of their common features. Therefore, the presentation and the perception of symbols result in some conscious and/or emotional effect.

Examining the individual conducts of committing the offence, the Constitutional Court found that the distribution of symbols of despotism [Section 269/B para. (1) item a) of the CC] means, in general, a form of public communication – i.e. selling, shipping, delivering, renting, distributing or exhibiting in public – of the emblems or other bearers of the prohibited symbols. The purpose of such distribution is to make the symbols specified by the law publicly known as widely as possible.

According to Section 269/B para. (1) item b), using in front of a large public gathering means wearing the symbol in a way that is apparent to anyone at once, or applying it on a distributed product as a sign. It also means that the symbols are recognisable at a single glance by an indefinable number of people. If the symbol is not used in front of a large public gathering, the criminal offence cannot be deemed implemented according to the part of the statutory definition mentioned above.

Public exhibition [Section 269/B para. (1) item c)] is performed by placing the symbols defined by the law at a public place. This way, the symbols are made accessible for several

people without any restriction. The above conduct reflects the perpetrator's intention to distribute the prohibited symbol and the connected ideology as widely as possible.

The Constitutional Court points out that, under the Convention, too, the freedom of expression carries with it „duties and responsibilities". All authorities of the State must protect the values of a democratic state under the rule of law, and they are obliged to respect the human dignity of persons. The actions representing force, hatred and opposition must be acted against. Rejecting the use of force and even the threat of force as tools of solving conflicts is part of the complex concept of democracy.

Allowing an unrestricted, open and public use of the symbols concerned would, in the present historical situation, seriously offend all persons committed to democracy, who respect the human dignity of persons, and thus condemn the ideologies of hatred and aggression, and would offend in particular those who were persecuted by Nazism and Communism. In Hungary, the memories of both ideologies represented in the prohibited symbols as well as the sins committed under these symbols are still alive in public knowledge and in the communities of those who have survived the persecutions; these things are not forgotten. The individuals who suffered severely and their relatives live among us. The use of such symbols recalls the recent past, together with the threats of that time, the inhuman sufferings, the deportations, and the deadly ideologies.

In the opinion of the Constitutional Court, it is indeed the protection of democratic society and, therefore, not unconstitutional if, in the present historical situation, the State prohibits certain conducts contrary to democracy, connected to using particular symbols of despotic regimes: their distribution, using in front of a large public gathering, and public exhibition [Section 269/B para. (1) items a)-c)].

5. The Constitutional Court has been engaged in interpreting Article 70/A of the Constitution in several decisions. According to the practice of the Constitutional Court, although the concept of equal protection by the law can only be found in the text of paragraph (3) of the said article, the requirement of equal protection by the law is present in every rule of Article 70/A. Equal protection by the law essentially means that the State as a public power and as the legislator shall guarantee equal treatment for all persons in its territory. In this context, no discrimination may be made on the basis of race, colour, gender, language, religion, political

or other opinion, national or social origins, financial situation, birth or on any other grounds whatsoever. The prohibition found in Article 70/A para. (1) is applicable not only to human and fundamental civil rights but – provided that the discrimination violates the right to human dignity – to the whole legal system as well, including the rights that do not belong to human rights and fundamental civil rights [Decision 61/1992 (XI. 20.) AB, ABH 1992, 280].

According to the Constitutional Court, in this sense, the protection of the communities committed to the values of democracy are founded on the constitutional provisions related to the equality of people and the prohibition of discrimination in Article 70/A as well as to the fundamental right to human dignity laid down in Article 54 para. (1). Although Section 54 para. (1) of the Constitution defines the fundamental right to human dignity as a right of "humans", the CCDec., considered one of the basic decisions of the Constitutional Court, also referred to the "efficient protection of the dignity of communities" (last paragraph of point V.4). The Constitutional Court acknowledged the protection of "certain communities of people" (last paragraph of point IV.1), or of "certain groups of people", even by way of restricting the freedom of expression. It is expressly mentioned in the CCDec. that the "honour and dignity of those who belong to the group" may be protected against actions threatening those values (point V.2). It is expressly stated in the CCDec. that "the protection of the dignity of communities may constitutionally justify the restriction of the freedom of expression" (last paragraph of point V.4).
The Constitutional Court has applied in this spirit the rules explained above concerning the protection of the dignity of communities. The Constitutional Court established in Decision 33/1998 (VI. 25.) AB that the "dignity of the assemblies of the representatives of local governments" is a constitutional limitation on the freedom of expression, too (ABH 1998, 256).

Taking into account all the above, the Constitutional Court established that the regulation as provided in Section 269/B of the CC protecting the dignity of communities committed to the values of democracy can be a constitutional restriction concerning the freedom of expression.

Although the constitutional assessment and the evaluation of sanctioning in the criminal law the violation of the separate values protected by the law – namely public peace and the dignity of communities committed to the values of democracy, independently of each other – could possibly result in a different conclusion; still, as the use of despotic symbols violates both

values jointly and simultaneously, there is a cumulative and synergetic effect reinforced by the present-day impact of recent historical events.

The Constitutional Court holds that the historical experience of Hungary and the danger to the constitutional values threatening the Hungarian society reflected in the potential to publicly demonstrate the activities based on the ideologies of former regimes convincingly, objectively and reasonably justify the prohibition of such activities and the use of criminal law in combating them; the restriction of the freedom of expression found in Section 269/B para. (1) of the CC is, in light of the historical background, considered a response to a pressing social need.

According to the Constitutional Court, in the present historical situation, there is no other efficient legal tool than the tools of criminal law and penal sanctions (ultima ratio) against the use of symbols specified in Section 269/B para. (1) as the subjects of committing the crime, and in particular, the three specific conducts of committing the crime, for the protection of the aims represented in the constitutional values. In another country with similar historical experience, it is also prohibited in the Criminal Code, among the offences endangering the democratic state under the rule of law, to use the symbols (flags, badges, uniforms, slogans, and forms of greeting) of unconstitutional organisations [Strafgesetzbuch (StGB) vom 15. Mai 1871 (RGBl. S. 127) in der Fassung der Bekanntmachung vom 13. November 1998 (BGBl. I, 3322) § 86a.].

6. However, when the Constitutional Court established that it was unavoidably necessary to restrict the fundamental right in the interest of the democratic society for the prevention of acts endangering public peace and offending the dignity of the community, furthermore that protection may be provided by criminal law, it also examined the existence of a joint precondition prescribed by the CCDec. for the constitutionality of the restriction, namely that the restriction is only constitutional if it is proportionate to the weight of the objective of protection.

The content prohibited in the statutory definition of the CC is a conduct of a preparatory nature, it defends the public peace of the democratic state under the rule of law with due regard to the events of recent historical times. At the same time, it is also taken into account that more serious crimes may also be realised through the use of such symbols.

It is not prohibited by the law to produce, acquire, keep, import, export or even use such symbols provided it is not performed in front of a large public gathering. There are only three particular active conducts specified by the law as being contrary to the values of the democratic state under the rule of law (distribution, use in front of a large public gathering, and public exhibition) because of the suitability of such conducts not only to "insult or cause amazement or anxiety" to the public, but to raise express fear or threat by reflecting identification with the detested ideologies and the intention to distribute openly such ideologies. Such conducts can offend the whole of the democratic society, especially the human dignity of major groups and communities that suffered from the most severe crimes committed under the symbols of both ideologies represented by the prohibited symbols.

Section 269/B of the CC is a more specific and a considerably narrower statutory definition than the other provision of criminal law declared unconstitutional. It is of a much narrower scope, defining more specific conducts constituting the offence, and therefore it restricts the freedom of expression less extensively and more predictably than it was provided for in the restriction of conducts found in former paragraph (2) of Section 269 of the CC, declared unconstitutional by the decision of the Constitutional Court referred to above.

The Constitutional Court holds that Section 269/B para (1) of the CC is a subsidiary provision in respect of the three active conducts. The offence is qualified as a misdemeanour with the primary sanction of a fine. The statutory definition provides for a relatively wide scale of special circumstances justifying exemptions. Paragraphs (2) and (3) relieve the prohibitions. Section 269/B para. (2) of the CC defines the causes excluding criminal accountability in respect of the conduct concerned. Accordingly, the person who commits the act defined in paragraph (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 punishable.
This is justified by the need to allow everyone to acquire knowledge on the true facts of history and to make a wide scale of audience have access to factual and useful information necessary for public education.

According to the provisions of paragraph (3), the statutory definition does not cover the official symbols of other states in force.

On the basis of the above, in the opinion of the Constitutional Court, the restriction specified in Section 269/B para. (1) of the CC is not considered disproportionate to the weight of the protected objectives, while the scope and the sanction of the restriction is qualified as the least severe potential tool and, therefore, the restriction of the fundamental right defined in the given provision of the CC is in compliance with the requirement of proportionality.

Bearing in mind all the above, the Constitutional Court has established that Section 269/B of the CC does not restrict the freedom of expression unnecessarily and disproportionately and, therefore, it rejects the petitions alleging the unconstitutionality of the challenged provisions.

V

According to Section 21 para. (3) of Act XXXII of 1989 on the Constitutional Court, only the persons and bodies specified in the Act are entitled to initiate the examination of the alleged collision of a certain statute with an international treaty. As the petitioners are out of the scope defined, the related parts of the petitions are rejected by the Constitutional Court as ones originating from persons other than those entitled to do so.

The importance of the subject reviewed justifies the publication of this Decision in the Official Gazette.

Budapest, 9 May 2000

Dr. János Németh
President of the Constitutional Court

Dr. István Bagi
Judge of the Constitutional Court

Dr. Mihály Bihari
Judge of the Constitutional Court

Dr. Ottó Czúcz
Judge of the Constitutional Court

Dr. Árpád Erdei
Judge of the Constitutional Court

Dr. Attila Harmathy
Judge of the Constitutional Court

Dr. András Holló
Judge of the Constitutional Court

Dr. László Kiss
Judge of the Constitutional Court

Dr. István Kukorelli
Judge of the Constitutional Court

Dr. János Strausz
presenting Judge of the Constitutional Court

Dr. Éva Tersztyánszky-Vasadi
presenting Judge of the Constitutional Court

Concurring reasoning by Dr. András Holló, Judge of the Constitutional Court

I agree with the holdings of the Decision and with the rejection of the petitions seeking the establishment of the unconstitutionality and the annulment of Section 269/B of Act IV of 1978 on the Criminal Code (CC): Section 269/B of the CC is a restriction of the freedom of expression that may be constitutionally justified.

The Constitutional Court presented the general interpretation of Article 61 para. (1) of the Constitution – as referred to in the Decision as well – in Decision 30/1992 (V. 26.) AB (ABH 1992, 167; hereinafter: the CCDec.). Accordingly, the freedom of expression, as a "mother right" of various freedoms, enjoys special constitutional protection: the standard of its restrictability – the scope of its essential contents – is defined by the Constitutional Court in a wider sense than the constitutional limits of the restrictability of fundamental rights in general: "… the right to free expression must only give way to a few rights; that is, the laws restricting this freedom must be strictly construed" (ABH 1992, 178).
I agree with the Decision in that the general principles of the CCDec. on the constitutional restrictability of the contents of the freedom of expression are to be followed also in examining the present case, "bearing in mind the fact that the conducts of committing the offence specified in Section 269/B para. (1) reviewed in the present case make it necessary to apply other aspects of examination and assessment, too."

However, in the assessment of the constitutionality of Section 269/B of the CC, the same basic questions are to be answered as raised in the CCDec. when reviewing Section 269 of the CC, namely, whether

– it was unavoidably necessary to restrict the freedom of expression in case of the conducts specified in the statutory definition,
– the restriction complied with the requirement of proportionality, namely, whether the set of tools of criminal law were necessary and adequate for the aim to be achieved both in general terms and in respect of the statutory definition of criminal law concerned. (ABH 1992, 172)

The Decision acknowledges Section 269/B of the CC as a constitutional (necessary and proportionate) restriction of the freedom of expression, as the conduct prohibited by the law:

– "endangers public peace by offending the dignity of the communities committed to the values of democracy", and

– it serves the purpose of protecting the constitutional value of being a democratic state under the rule of law, namely: the constitutional requirement of the democratic exercise of power, and the constitutional prohibition of forcible exercise of power as well as attempts thereto (Article 2 paras (1) and (3) of the Constitution).

In my opinion, it should have been pointed out in the reasoning of the Decision that the constitutional values and prohibitions specified in Article 2 paras (1) and (3) of the Constitution are the primary and determining reasons justifying the constitutional restriction. In the present case, the State's measures restricting the fundamental right are justified by the protection of the constitutional value rather than by the enforcement of the fundamental right. Distributing symbols of despotism for the express purposes of trade in a profit-oriented form and wearing or using such symbols within the limits of subjective expression of one's opinion etc. may not be considered a misuse of the freedom of expression restricting the dignity of the community and the enforcement of the "right to the dignity of the community" – a fundamental right that may be restricted as a separate entity independently of the right to life (Decision 64/1991 (XII. 17.) AB) – to the extent and, at the same time, in a way endangering public peace that would necessitate and render proportionate the application of criminal law tools.
The above conclusion is also supported by the prominent role of the freedom of expression defined in the CCDec. and accepted by the Decision as well, namely: applying a wider standard in assessing the constitutionality of the restriction and the strict interpretation of the restrictive laws.

In the present case, the constitutionality of restricting the fundamental right is justified by the protection of fundamental constitutional values and the penal law guarantees of the prohibition. Democracy is considered by the constitution-making power a constitutional value deserving protection – as pointed out in the CCDec. as well – with special emphasis on the right to be different, on the protection of minorities, and on the rejection of using force and

even the threat of force as tools of solving conflicts (ABH 1992, 173); for the protection of the above values, it makes unconstitutional any activity directed at the forcible acquisition or exercise of public power, or at the exclusive possession thereof.

Section 269/B of the CC prohibits the distribution and use of symbols of despotism reflecting political ambitions that are contrary to the democratic exercise of power protected by the Constitution, and it is everyone's obligation to resist such conducts and activities.
Section 269/B restricts the freedom of expression for the protection of the constitutional values detailed above to the extent necessary and in a proportionate manner in order to prevent the actual endangering of such values.
In my opinion, assessing by the Constitutional Court the proportionality of restriction would have justified the establishment of a constitutional requirement referring also to the reasonable endangering of constitutional values. The Constitutional Court has already applied such a method in reviewing the constitutionality of other statutory provisions of criminal law. When defining the constitutional requirement in the application of Sections 179 and 180 of the CC, it also specified – on the basis of the specific statutory definition – the "constitutional conditions" of criminal accountability as well [Decision 36/1994 (VI. 24.) AB, ABH 1994, 219].

In the holdings of the Decision, the Constitutional Court should have stated the following: "For the purposes of Section 269/B – with due regard to Article 2 paras (1) and (3) of the Constitution – it is a constitutional requirement to examine the misuse of the freedom of expression. The distributor, user etc. of a prohibited symbol is only punishable if the conduct performed qualifies as an institutional support or propaganda for the dictatorships symbolised by such signs, or if the conduct performed extends beyond the scope of expressing one's personal opinion interpreted in the narrow sense."

Having due regard to Article 2 paras (1) and (3) of the Constitution (see the CCDec.), it is this the narrow interpretation which makes the necessary restriction proportionate and thus constitutional as applied in Section 269/B of the CC.

Budapest, 9 May 2000

Dr. András Holló

Judge of the Constitutional Court

Dissenting opinion by Dr. István Kukorelli, Judge of the Constitutional Court

Upon reviewing the constitutionality of Section 269/B of Act IV of 1978 on the Criminal Code (hereinafter: the CC), the Constitutional Court had to answer the question whether it is possible to punish those who use certain Nazi or Communist symbols in Hungary, where the value of the democratic state under the rule of law is inviolable [Article 2 para. (1) of the Constitution] and the freedom of expression enjoys extra protection [Article 61 (1) of the Constitution].

In a constitutional democracy, it must be made clear in the legislation, the jurisdiction and in the political life, too, that the public authority is determined in combating extreme ideologies. The State is obliged to act, and offer protection for its citizens, against aggressive expressions, ones inciting to use force and those that hurt human dignity. It is still a question when such an act by the State may be considered constitutional, and especially if the ultimate tool of the legal liability system, i.e. criminal law is used.

Although I can agree with the essence of the reasoning of Act XLV of 1993 specifying Section 269/B of the CC, and I condemn extremist political ideologies, dictatorships as well as their symbols, I am not convinced that the objectives of the legislation should finally be implemented by using the tools of criminal law.

Priority role of the freedom of opinion

The freedom of expression, i.e. the freedom of expressing one's opinion is one of the most fundamental human rights. It allows people to share thoughts, experience and opinions with other people. The freedom of expression and the right to human dignity are inseparable.

The right to the freedom of expression is one of the fundamental values of a pluralist democratic society. In the practice of the Constitutional Court, this right has a special place among the constitutional fundamental rights, amounting in effect to the "mother right" of the so-called fundamental rights of "communication" that jointly allow the person to participate in social and political processes. The intellectual enrichment of the society depends on the freedom of expression as well: false ideas can only be filtered out if contradicting arguments can confront in free and open debates, and also harmful ideas have the chance to come to

light. “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” [Decision 30/1992 (V.26.) AB, (hereinafter: CCDec.), ABH 1992, 167, 171].

In Hungary, similar to other constitutional democracies, the freedom of expression enjoys extra protection and it may only be restricted in especially justified cases. As held by the Constitutional Court, “the right to free expression must only give way to a few rights; that is, the laws 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 individual 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)” (ABH 1992, 178)

Public use of symbols and freedom of opinion

The distribution, use in front of a large public gathering, and the public exhibition of certain Nazi and Communist symbols specified in Section 269/B of the CC are punishable. According to the Decision, only three prominent conducts of committing the offence are prohibited while the production, acquisition, keeping etc. of symbols is not punishable. According to the judicial practice, the existence of a large public gathering may be established if there were a great number of people present at the place of committing the offence, or there was the possibility of a great number of people or an indefinable number of people acquiring knowledge of the offence (BH 1981, 223). In the judicial practice, the presence of ten to twenty persons at the same time is always deemed a large public gathering, and therefore, it covers committing the offence at a public place or another place open to the public and it even includes events of restricted access if a great number of people were present there. According to Section 137 item 12) of the CC, it qualifies in every case as a large public gathering if the offence is committed through “communication in the press or other mass media, by

reproduction, or by communicating electronically recorded information via a network of telecommunication", that is – among others – through the Internet.

In my opinion, among the activities related to extremist political symbols, the CC sanctions the ones that belong to the essential content of the freedom of expression, and thus they are under the strongest constitutional protection. By using and demonstrating the symbols in public, the individual can inform others on his or her political conviction. As a participant in social communication, the person wearing the symbol expresses his or her own opinion, calling the attention of others to his or her personal commitment. Those who wear a symbol depicting the five-pointed red star or the swastika, those who exhibit Communist or Fascist symbols at a place open to the public, and those who publish such symbols in the press to illustrate their convictions make it evident and clear for others that they identify themselves with one of the extremist ideologies. Therefore, anyone using in public a symbol of despotism exercises his or her freedom of expression, the freedom of expressing one's opinion. The conducts of committing the offence listed in the CC may not be deemed exceptional by any means, since these conducts, currently specified as punishable in Section 269/B of the CC, are the only ways to express by the use of symbols one's opinion for other people to know. It would be senseless to use political and ideological symbols in any way unrecognisable by others, "between four walls". The legislature must find a constitutional justification of an adequate weight to exclude the symbols of extremist ideologies from publicity.

Protection of "public peace" and "dignity of communities"

In examining incitement against the community, the Constitutional Court applied in the CCDec. the test of clear and present danger accepted in most of the constitutional states under the rule of law and the requirement of the individuality of the offended values. According to the decision, it is constitutional to punish incitement to hatred, as in this case, the expression of one's opinion endangers several individual rights in addition to disrupting social order and peace: "the emotions whipped up against the group threaten the honour, dignity (and life, in the more extreme cases) of the individuals comprising the group, and by intimidation restricts them in the exercise of their other rights as well". In contrast, the prohibition of "mudslinging" is unconstitutional, as it "amounts to an abstract protection of the public order and peace as an end in itself. The criminal offence is committed even if under the given circumstances, the utterance of the offending statement does not result in even the threat of

violating an individual right." (ABH 1992, 179) The Constitutional Court pointed out in the decision concerned that "public peace" 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 instigate a much greater disruption of public peace. In addition, the unnecessary and disproportionate restriction of the freedom of expression reduces the openness of a society." (ABH 1992, 180)

The statutory definition prohibiting the use of symbols of despotism does not specify any element requiring the endangering of others or the raising of animosity or hatred. Section 269/ B of the CC merely punishes the public use of the symbols specified.

It is pointed out by the Constitutional Court in the CCDec that "According to Article 54 of the Constitution, everyone has the inherent right to human dignity. Accordingly, human dignity may restrict the freedom of expression." According to the decision, the legislature may protect by measures of criminal law the "dignity of communities" also beyond the scope of the statutory provision of incitement to hatred. "Nonetheless, there are other means available, such as expanding the possible use of moral damages, to provide effective protection for the dignity of communities." (ABH 1992, 181)

In my opinion, the public use or distribution of symbols of despotism does not, in itself, violate the fundamental right to human dignity. Since Decision 8/1990 (IV. 23.) AB of the Constitutional Court, this right has been considered one of the expressions of the "general personality right", as a legal tool of the person's self-determination within the society. The fundamental right to human dignity and the general personality right specified in Section 75 of the Civil Code serve the purpose of securing the individuals' autonomy of acting and protecting the individuals' social reputation and good standing. Any position securing the right to dignity for "communities" of an obscure definition would contradict the above arguments, as such a right may only be related to individuals.

The "dignity of communities" was mentioned in the CCDec. in relation to the special legal subject of the statutory definition of incitement to hatred. Prohibiting the expression of opinions of an inciting nature has been justified on the grounds of the incitement resulting in the direct danger of using force against any ethnic, racial or religious group, or against other groups among the population, or violating the right to human dignity of the persons comprising communities living in the territory of Hungary. Consequently, it is not the community, as a group of indefinite persons, or the organisation, independently of its members, which has dignity (as it would be theoretically nonsense) but the subjective right to human dignity of the individuals comprising the communities is what deserves protection.

Most of the people think of the public use of symbols of despotism as the expression of hatred, contempt and animosity against certain groups. In most cases, the presentation of such symbols offends the emotions of others. Such circumstances alone, however, do not qualify as the violation of the right to human dignity. No one has the right to have the State prohibit the expression of others' opinion because of that expression being offensive to him or her as the member of an ethnic, racial, religious or cultural group. The fundamental right to the freedom of expression does protect any individual's right to express his or her opinion offending the interests, opinion or sensibility of others.

Of course, the use of the symbols of extremist ideologies can, indeed, be offensive to human dignity in certain circumstances. Using symbols recalling the Nazi or Communist past for the purpose of annoying or offending certain persons or a particular group of persons would justify the perpetrator's accountability. It is especially important to use criminal sanctions against those who express their extremist political convictions by allowing no way for the offended persons to avoid the communication ("captured audience"). In contrast, Section 269/ B of the CC orders the punishment of any expression of the opinion "for all", "for the unnamed community", and thus it does not protect the right to human dignity or the "dignity of communities".

In my opinion, as far as Section 269/B of the CC is concerned, the protection of "the dignity of communities" may not be invoked, and the protection of "public peace" – as pointed out in the CCDec. as well – may not be used alone as a ground for restricting the freedom of expression.

I wish to emphasise that if an opinion expressed by using the symbols concerned incited to hatred, the perpetrator would be punishable even today on the basis of Section 269 of the CC maintained in force by the Constitutional Court. If, in addition to that, it was deemed necessary by the legislator, it would have the chance to create a new statutory definition to protect the "captured audience".

Test of neutrality

In the CCDec., the Constitutional Court – in line with the case law of several other European bodies protecting constitutionalism – acknowledged the neutral interpretation of the freedom of expression. "The right to free expression protects opinion irrespective of the value or

veracity of its content. (…) 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 what is protected by the Constitution. The Constitution guarantees free communication – as individual behaviour or a public process – and the fundamental right to 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. (ABH 1992, 179) Consequently, no expression of an opinion may be restricted out of context, merely on the basis of its content. The necessity of restricting the right does, in each case, depend on all of the circumstances (place, time, the scope of addressees etc.) of expressing one's opinion. It follows from the principle of neutrality that the expression of one's agreement with a despotic regime may, in itself, not be punished merely on the basis of the contents of the opinion. Section 269/B does not comply with the above requirements as it condemns the opinion on the basis of its contents and it does not apply an external restriction on the freedom of expression.

The requirement of neutrality as far as values are concerned does not mean that the State is not allowed to make a distinction between democratic and antidemocratic efforts. As pointed out in the CCDec., the State may support opinions found agreeable and may act against them if deemed wrongheaded, provided that in doing so the freedom of expression is not violated. Article 2 para. (3) of the Constitution orders to act against any endeavour directed at the forcible acquisition or exercise of public power or at the exclusive possession of such power. Article 8 para. (1) specifies the protection of fundamental human rights as the primary obligation of the State. The legislature has complied with the above two requirements by securing criminal law protection for the constitutional order of the Republic of Hungary in the Chapter "Offences against the State" of the CC, by punishing the use of force against a member of a national, ethnical, racial or religious group in Section 174/B, and by sanctioning incitement against the community in Section 269. This way, inciting speeches and forcible actions are not left unpunished even today. If the expression of an extremist opinion is addressed to a specific person, the perpetrator – upon the conditions specified in the CC – is punishable for defamation, and this way the offending of human dignity is addressed by criminal law, too. The legislature might create special statutory definitions to sanction forcible

acts, direct threats, incitement and defamation committed by using Nazi or Communist symbols. All the above would not be against the requirement of neutrality as the accountability would be based on the direct and foreseeable effect of the opinion of an extremist content rather than on the opinion itself.

By tolerating the public use of symbols of despotism, the State would not remain without tools against opinions supporting the ideologies of Fascism and Communism. The State could express the deep contempt of totalitarian ideologies through the education of children, the preferences of supporting culture, and through many other ways.

Examining the historical situation

According to the Decision, the special historical past of Hungary necessitates restrictions of the fundamental rights; there are historical circumstances justifying that the State orders the punishment of those who use symbols of despotism. However, the history of Hungary in the 20th century and the memories of Nazi and Communist sins can justify the contrary: the freedom of expression is one of the greatest defenders of democracy, and therefore it deserves special protection. Constitutional democracies differ, among others, from regimes of dictatorship in offering wide freedom for expressing one's opinion, this way supporting the creation of a democratic public opinion. Restricting the freedom of expression has never succeeded in preventing the dissemination of totalitarian ideologies, and no antidemocratic regime has gained power with the support of the freedom of expression.

This is also a typical feature of the history of Hungary, its political culture and the behaviour of voters: at free elections held in Hungary, no extremist political forces have ever gained power. Fascist or Communist dictatorships were created in the 20th century history of Hungary when the country was occupied by the army of other states.

The Constitutional Court pointed out in the CCDec. the following: “The recent change of the 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. (…) Criminal sanctions must be applied for the protection of other rights and only when unavoidably necessary, and they

should not be used for shaping public opinion or the manner of political discourse – in a paternalistic manner" (ABH 1992, 180).

On the eve of acceding to the EU, Hungary should not be satisfied with securing a minimum level of protection that seems to comply with international standards, as the dictatorial events of the past indeed require a wide-scale protection of fundamental rights. The obligations of Hungary based on international treaties do not result in the prohibition of using extremist symbols.

As far as the role of historical events is concerned, I wish to point out the importance of the passing time as well. In the Case Lehideux and Isorini vs France, the European Court of Human Rights established in its judgement of 1998 that the right to the freedom of expression of two leaders of the association established for protecting the memory of Marshall Pétain had been violated. The petitioners had been condemned in France on the basis of publishing an article in the newspaper *Le Monde* listing the acts of Pétain that may justify a positive image of him. At the Court, the French government argued, among others, that the period concerned in the history of France had been a very critical one and the petitioners torn up wounds by publishing the article. However, the Court ruled that the historical events concerned had happened more than forty years before, and the time since then was long enough to make the above argument outdated, which might not have been the case if the events concerned had happened ten or twenty years before. The Court emphasised that all States must endeavour to make their own history debatable openly and without passion. It referred to former judgements (Open Door and Dublin Well Women *vs* Ireland, Vogt *vs* Germany) pointing out that the freedom of expression covers not only neutral or positively accepted opinions but also communications the expression of which may be disturbing or shocking. This is required by pluralism, tolerance and open thinking – notions that no democratic society can exist without.

I am convinced that freedom-loving people are determined to condemn antidemocratic ideologies and the vast majority of voters would say no to any radical attempt endangering constitutional order.

As was put by the most tolerant Hungarian democrat, István Bibó, "In the cramped state of fear of believing that the promotion of freedom could endanger the cause of the nation, the fruits of democracy cannot be enjoyed. To be a democrat means, first of all, not to fear: not to fear those of another opinion, of another language, of another race, of revolution, of conspiracies, of the unknown evil intentions of the enemy, of abasement, and of all the imaginary dangers becoming real ones by fearing them. (…) In the constant feeling of fear and danger, all the things real democracies get to know only at the time of real danger became

a rule: restriction of public freedoms, censorship, looking for the “hirelings” of the enemy, the “traitors”, the forcing on people order or the impression of order at any expense and the unity of the nation to the debit of freedom.” (István Bibó: Misery of the Small States of Eastern Europe, in István Bibó: Selected Studies Vol. 2 p. 220)

Based on the above, in my opinion, Section 269/B of the CC is not in line with the freedom of expression specified in Article 61 para. (1) of the Constitution as one of the main criteria of democracy, and therefore – while emphasising that I deeply disagree with the ideological contents of the symbols of despotism – I voted no on the holdings in accordance with my conviction as a Constitutional Judge.

Budapest, 9 May 2000

Dr. István Kukorelli
Judge of the Constitutional Court

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