Decision 18/2004 (V. 25.) AB

IN THE NAME OF THE REPUBLIC OF HUNGARY

On the basis of a petition submitted by the President of the Republic seeking a prior review of an Act passed by the Parliament but not yet promulgated, the Constitutional Court has adopted the following

decision:

The Constitutional Court holds that Section 1 of the Act adopted at the session of the Parliament on 8 December 2003 on the amendment of Act IV of 1978 on the Criminal Code is unconstitutional.

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

REASONING

I

1.1. At its session of 8 December 2003, the Parliament adopted an Act on the amendment of Act IV of 1978 on the Criminal Code (hereinafter: the CC). This Act (hereinafter: the CCAm) has amended several elements of the statutory definition of incitement against a community as contained in Section 269 of the CC, and added a new paragraph (2) thereto. The President of the Republic did not sign the CCAm because of his concerns about the constitutionality thereof and – exercising the power vested on him in Article 26 para. (4) of the Constitution – initiated in his petition of 22 December 2003 a prior constitutional review of the CCAm on the basis of Section 1 item a), Section 21 para. (1) item b), and Section 35 of Act XXXII of 1989 on the Constitutional Court (hereinafter: the ACC).

In the opinion of the President of the Republic, Section 269 para. (1) of the CC as amended by the CCAm violates the freedom of expressing one's opinion, a right granted in Article 61 para. (1) of the Constitution, as the expression "provokes hatred" may be interpreted by the courts in a way resulting in the lowering of the threshold of punishability, and the offence described as "calls for committing a forcible act" is unconstitutional because it would not endanger individual rights. In the opinion of the President of the Republic, paragraph (2) in Section 269 of the CC as introduced by the CCAm violates the freedom of expression as it protects public peace in an abstract and general way. In addition, according to the petition,

this paragraph is contrary to the right to self-determination as part of the right to human dignity acknowledged in Article 54 para. (1) of the Constitution.

1.2. On being informed about the petition submitted by the President of the Republic, the Minister of Justice, who had submitted to the Parliament the Bill on amending the CC, sent his opinion to the Constitutional Court.

2.1. When examining the petition, the Constitutional Court drew on the following provisions of the Constitution:

"Article 2 para. (1) The Republic of Hungary is an independent democratic state under the rule of law."

"Article 8 para. (1) The Republic of Hungary recognises inviolable and inalienable fundamental human rights. The respect and protection of these rights is a primary obligation of the State.

(2) In the Republic of Hungary regulations pertaining to fundamental rights and duties are determined by law; such law, however, may not restrict the basic meaning and contents of fundamental rights."

"Article 54 para. (1) In the Republic of Hungary everyone has the inherent right to life and to human dignity. No one shall be arbitrarily denied of these rights."

"Article 61 para. (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."

2.2. Pursuant to Section 269 of the CC in force, the statutory definition of incitement against a community is as follows:

"Section 269 A person who, in front of a large public gathering, incites hatred against

a) the Hungarian nation,

b) any national, ethnic, racial or religious group, further against any group among the population, commits a felony and is to be punished by imprisonment for a period of up to three years."

2.3. The CCAm challenged in the petition of the President of the Republic provides for the following:

"Section 1 Section 269 of Act IV of 1978 on the Criminal Code shall be replaced by the following provision:

»Section 269 (1) Anyone who in front of a large public gathering provokes hatred or calls for committing a forcible act against any nation or any national, ethnic, racial or religious group, or against any group among the population, commits a felony and is to be punished by imprisonment for a period of up to three years.

(2) Anyone who hurts human dignity in front of a large public gathering by disparaging or humiliating others on the basis of national, ethnic, racial or religious identity commits a misdemeanour and is to be punished by imprisonment for a period of up to two years.«

Section 2 This Act shall enter into force on the 15th day following its promulgation."

II

It is emphasised by the Constitutional Court in the present case as well that "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." [Decision 30/1992 (V. 26.) AB (hereinafter: CCDec. 1), ABH 1992, 167, 173]. Utterances verbally abusing, inciting to and raising hatred and hysteria against racial, ethnic, national or religious communities or the members thereof act against human civilisation. All people, especially public actors, are expected to take firm action against such phenomena.

In the present case, however, the Constitutional Court had to take a position, in the form of a prior constitutional review, as to whether the freedom of expression may be constitutionally restricted to the extent the legislature intends to criminalise in the CCAm expressions of extreme opinions.

1.1. In answering the above question, the Constitutional Court started out from Article 61 para. (1) of the Constitution granting the freedom of expression as the mother right of communication rights, which ensures, on the one hand, self-expression and the free development of one's personality and, on the other hand, one's active and well-founded participation in social and political processes. Furthermore, it is stressed by the Constitutional Court that political debates involving the confrontation of different views, positions and ideas are part of democracy. Suppressing opinions or preventing the expression thereof does not annul those opinions and cannot prevent the dissemination of ideas. The intellectual enrichment of society depends on the freedom of expression as well: false ideas can only be screened out if contradicting arguments can confront in free and public debates, and if extreme ideas also have the chance to come to light.

The state of free expression is a clear indicator of the level of democracy. The fewer obstacles are placed in the way of opinions formed and expressed, the more stable is constitutional democracy. In a really free society, the expression of extreme views does not cause disturbances, but it rather contributes to the development of public peace and order as

well as to the improvement of people's level of tolerance. Where "one can encounter many different opinions, public opinion becomes tolerant". [CCDec. 1, ABH 1992, 167, 180, Decision 18/2000 (VI. 6.) AB (hereinafter: CCDec. 4), ABH 2000, 117, 128]

In a tolerant society where the freedom of expression is really ensured, society has an effect on individuals, who therefore have a stronger character and become intellectually independent persons who can manage their lives in an autonomous way, who are committed to the ideas and values they believe in, but who are also open to arguments expressed by those having different opinions or thinking in different ways.

International human rights documents aimed at the protection of a minimum level of freedom of expression as required by the rule of law in democratic societies also declare the freedom of forming one's opinion as well as the freedom of access to ideas and the free communication thereof. [Article 19 of the Universal Declaration of Human Rights, Article 19 of the International Covenant on Civil and Political Rights (hereinafter: the Covenant), Article 10 of the European Human Rights Convention, Chapter II Article 11 of the Charter of Fundamental Rights of the European Union (hereinafter: the Charter)] According to the European Court of Human Rights, forming and binding the judicial practice in Hungary, the freedom of expression is one of the pillars of democratic societies, and a precondition for the development of society and one's personality. This freedom is also applicable to opinions that are insulting or shocking or cause anxiety. This is required by pluralism, tolerance and an enlightened state of mind – notions that no democratic society can exist without. (Eur. Court H. R., Handyside v. United Kingdom, Judgment of 7 December 1976, Series A no 103, para 41., Jersild v. Denmark, Judgment of 23 September 1994, Series A no 298, para 37, Zana v. Turkey, Judgment of 25 November 1997, para 51)

1.2. Both the international human rights documents mentioned above and Article 61 of the Constitution protect the freedom of expression, but in certain cases they allow the restriction of that right.

Article 20 item 2 of the Covenant requires the States Parties to prohibit incitory speech. "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

Pursuant to item 4 of the International Convention on the Elimination of All Forms of Racial Discrimination adopted in New York on 21 December 1965, 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."

Not only the international treaties adopted in the framework of the UN, but also the documents issued by certain institutions of the Council of Europe and the European Union pay special attention to action against racism and hate speech. According to Principle 4 of Recommendation No R (97) 20 of the Committee of Ministers of the Council of Europe: "National law and practice should allow the courts to bear in mind that specific instances of hate speech may be so insulting to individuals or groups as not to enjoy the level of protection afforded by Article 10 of the European Convention on Human Rights to other forms of expression. This is the case where hate speech is aimed at the destruction of the rights and freedoms laid down in the Convention or at their limitation to a greater extent than provided therein."

It is the aim of the draft framework decision on action against racism and xenophobia proposed by the Commission of the European Union to enhance the efficiency of the Member States' legislation on combating racism, although at the session of the European Union's Justice and Home Affairs Council, where the draft framework decision was put forward, several Member States expressed reservations that resulted in the presidency proposing the amendment of the text of the draft framework decision. Accordingly, a reference is to be made in the text to Article 6 of the Treaty on the European Union and the framework decision should guarantee the maintenance of the Member States' constitutional principles and values. [Report on the proposal for a Council framework decision on combating racism and xenophobia (COM{2001} 664 - C5-0689/2001- 2001/0270{CNS})]

This is in line with the concept contained in the preamble of the Charter, i.e. that the Charter shall reinforce the rights rooted in the common constitutional traditions of the Member States.

The obligations undertaken by Hungary under international treaties do not result in allowing the legislature to disregard the fundamental right to freely express one's opinion when it regulates the State's powers in combating extremities. Even in the case of legislation aimed at the implementation of obligations undertaken under international treaties, the standard of legal protection set up by the Constitution and the test of necessity and proportionality created

by the Constitutional Court of Hungary are to be followed. This means that any necessary regulation prohibiting extremist expressions is to comply with the requirement of proportionality.

According to Article 8 para. (2) of the Constitution, the rules concerning fundamental rights and duties are defined by Acts of Parliament, which, however, may not restrict the essential contents of fundamental rights. In the practice of the Constitutional Court and in accordance with Article 8 para. (2) of the Constitution, "the State may only use the tool of restricting a fundamental right if this is the sole 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." (CCDec. 1, ABH 1992, 167, 171) As pointed out in the decisions of the Constitutional Court emphasising the prominent role of the freedom of expression, the Acts limiting the freedom of expression are to be interpreted strictly, i.e. it is a right that may only be restricted exceptionally and in a limited scope even by an Act of Parliament, for the purpose of protecting another fundamental right or constitutional value. [CCDec. 1, ABH 1992, 167, 178, Decision 36/1994 (VI. 24.) AB, ABH 1994, 219, 223, Decision 12/1999 (V. 21.) AB (hereinafter: CCDec. 2), ABH 1999, 106, 111]

III

1. According to the President of the Republic, the CCAm restricts in an unconstitutional way Article 61 para. (1) of the Constitution by using in Section 269 of the CC the term "provoking hatred" instead of the term "incitement to hatred". There is a danger that the courts applying the expression "provoking hatred" may – following the judicial interpretation given by the Supreme Court – lower the threshold of culpability specified by the Constitutional Court in CCDec. 1, thus violating Article 61 para. (1) of the Constitution. Due to the above uncertainty, the new provisions do not comply with "legal certainty as a requirement of constitutional criminal law demanding definiteness, clarity and the prevention of any arbitrary application of the law" as established in CCDec. 2. (ABH 1999, 106, 110-111)

2.1. As pointed out by the Constitutional Court several times, by virtue of Article 61 of the Constitution, “the opportunity and the fact of expressing one’s opinion are protected, irrespective of its contents”, and this provision “grants the free expression of opinions not only in respect of certain ideas, facts and opinions but protects the very possibility of expressing one’s opinion”. [CCDec. 1, ABH 1992, 167, 179, Decision 36/1994 (VI. 24.) AB, ABH 1994, 219, 223]

The presence of diverse views is the essence of a pluralist and democratic society. Diverse voices offer the chance of choice to autonomous individuals, and the presence of competing arguments helps to find a swift solution to social problems. Therefore, the State may not prohibit the expression and the dissemination of any views merely on the basis of their contents, nor may certain opinions be declared more valuable than others, as this would violate the requirement of treating individuals as persons of equal dignity (such a prohibition would result in preventing certain groups of people from expressing their personal convictions), and – by excluding certain views – prevent the development of a free, lively and open debate involving all relevant opinions, even before a political discourse could emerge.

Even in the case of extreme opinions, it is not the contents of the opinion but the direct and foreseeable consequences of its communication that justify a restriction of free expression and the application of legal consequences under civil or – in some cases – criminal law.

2.2. In CCDec. 1, the Constitutional Court specified the cases of extreme expressions where a criminal law sanction may be applied in line with Article 61 para. (1) of the Constitution:

The application of consequences under criminal law is justified when the act reaches a level where it is capable of whipping up such intense emotions in the majority of people which, upon giving rise to hatred, may result in disturbing social order and peace. If due to such an Act the disturbance of public peace “also involves the danger of a large-scale violation of individual rights: the emotions whipped up against the group concerned threaten the honour, dignity (and, in more extreme cases, the lives) of the individuals comprising the group, and through intimidation restrict them in the exercise of their other rights as well (including the right to the freedom of expression).” In the case of incitement to hatred, protection under criminal law is justified by the danger of violating the right to human dignity and other freedoms having a prominent place among constitutional values, as well as by the objective to protect the exercise of fundamental rights by members of national, ethnic, racial and religious groups, or by any group of the population, against prejudiced, abusive and contemptuous expressions.

Thus it is not true that the legislature sanctions unjust, injuring or shocking expressions by way of the criminalisation of "incitement to hatred". The Constitution guarantees free communication for everyone, "in which process every opinion, good and damaging, pleasant and offensive, has a place, especially because the classification of opinions is also the product of this process." [CCDec. 1, ABH 1992, 167, 179, Decision 36/1994 (VI. 24.) AB, ABH 1994, 219, 223, CCDec. 4, ABH 2000, 117, 121] In the case of "incitement to hatred", the restriction of the freedom of expression is justified by the violation of, or by the direct danger of violating, the exercise of individual fundamental rights.

Finally, it is important that the danger to public peace should be more than a mere presumption, and it is absolutely necessary to have at least a hypothetical feedback (the communication is suitable for disturbing public peace). It is the intensity of the disturbance of public peace that "above and beyond a certain threshold ("clear and present danger") justifies the restriction of the right to free expression". (CCDec. 1, ABH 1992, 167, 178-179)

In the case of acts qualifying as incitement to hatred, the freedom of expression needs to be restricted under criminal law in order to protect individual fundamental rights and public peace, since "the impact on and consequences for individuals and society of such acts 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 acts." (CCDec. 1, ABH 1992, 167, 176) In order to maintain the democratic order of society, to "waive the right to use force and the threat of force as a tool of resolving conflicts", and to protect specific individual fundamental rights, the State may legitimately apply sanctions under criminal law against those who commit acts that endanger these values and rights.

3. Next, the Constitutional Court has examined whether Article 61 para. (1) of the Constitution is restricted in line with the above requirements by the new statutory definition of "provoking hatred".

3.1. The legal objects protected by Section 269 para. (1) of the CC as defined by the CCAm are unchanged. [With the following exception: according to Section 269 of the CC in force, the Hungarian nation is the protected legal object, while according to Section 269 para. (1) as introduced by the CCAm, all nations are protected.] Committing the act in front of a large public gathering has remained an element of the statutory definition under criminal law. However, by adopting the CCAm, the legislature has defined the conduct of committing the offence as "provoking hatred".

The Constitutional Court examined in CCDec. 1 the history of the statutory definition under criminal law of incitement against a community, finding that from Act V of 1878 on the Hungarian Criminal Code (Codex Csemegi) until putting into force Act V of 1961, the conduct of committing the offence had been "provoking hatred", then it was changed to "committing an act suitable for raising hatred", and it was only Act XXV of 1989 that introduced the concept of incitement. The latter statute "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." (CCDec. 1, ABH 1992, 167, 169)

CCDec. 1 established the following about Section 269 of the CC as specified in Section 15 of Act XXV of 1989:

"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 provoking 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." (CCDec. 1, ABH 1992, 167, 177-178)

In CCDec. 2, which examined Section 269 of the CC as specified in Section 5 of Act XVII of 1996, and annulled the new conduct of committing the offence specified as "committing any other act suitable for raising hatred", the following is pointed out: it is incitement to hatred in the case of which restricting under criminal law the freedom of expression is constitutionally acceptable.

“In the Decision of the Constitutional Court, incitement to hatred was set as the constitutional threshold of punishability. As pointed out in the statements of the Constitutional Court Decision quoted in Part II point 3.2., according to the judicial practice followed for a hundred years, it is only incitement that incorporates a level of danger »above a certain limit« that may allow the restriction of the freedom of expression. Punishing other acts suitable for the arousal of hatred would diminish the threshold of restrictability. If the level of danger reaches the scale of incitement, there is no need to specify »other acts« as the statutory definition of incitement covers such conduct.” (CCDec. 2, ABH 1999, 106, 110)

3.2. In the present case, the Constitutional Court is to answer the question of whether in Section 269 para. (1) of the CC, the change from “incitement to hatred” to “provoking hatred” could result in diminishing the threshold of punishability acknowledged as constitutional in CCDec. 1 and CCDec. 2.

The judicial practice in recent years has showed problems of legal interpretation in respect of what to regard as incitement, and whether particular extreme expressions reached the level of punishability in specific cases. According to the decisions of the Supreme Court, provoking and incitement are terms that describe different conducts. There is a difference between the contents of the two words: provoking addresses one’s mind, while incitement manipulates one’s instincts and emotions and mobilises the addressees. Therefore, in the judicial interpretation, incitement is a graver act.

“In defining the concept of incitement to hatred, the court of first instance was right in taking into account the provisions of Constitutional Court Decision 30/1992 (VI. 26.). As the terms used in the statutory definition are not defined in the CC itself, their everyday meanings are to be considered. [...] The expressions used by the defendants, and particularly by the defendant in the first degree, had »touched« the limits of incitement but had not gone beyond that, because they may have been suitable for raising hatred but they had not incited to active hatred.” [(Supreme Court) Legf.Bír.Br. I. 1062/1996; BH1997. 165.]

“Provocation is the public expression of a thought which can form other people’s views and emotions with regard to certain phenomena, and consequently, in some cases, it can generate impetuous effects in the psyche of others. However, while provocation may manifest itself in persuasion based on presenting reasonable arguments, and it can be aimed at phenomena considered harmful according to the general value judgement of society, in most cases, such criteria cannot be found in the case of incitement, the synonyms of which are arousal, instigation, excitation, encouraging, or whipping up.” (Legf. Bír. Bfv. X.1105/1997.)

"Incitement targets not the mind but the primary instincts as it aims at affecting the emotions of others by whipping up passions, taking into account the possibility that the hostile feelings so raised may erupt and become unstoppable." (Legf.Bír.Bf. IV.2211/1997.; BH1998. 521.)

"In the legal reasoning of the Constitutional Court's decisions and in individual decisions No BH1997. 165. and BH1998. 521. of the Supreme Court, one can find definite guidance on how to interpret the term 'incitement to hatred'. In summary: incitement to hatred is to be established – instead of exercising the right to free expression – when someone calls for

- a forcible act, or
- the commission of such conduct or act,
- if the danger is not merely a presumed one, the endangered rights are concrete, and the threat of the forcible act is direct.

[…] The Metropolitan Court was wrong in establishing that it is enough on the perpetrator's part to foresee that the hatred so raised might step out of the enclosed world of emotions and become visible by others, because the three requirements detailed above must be met as well. The Metropolitan Court was also wrong in arguing that a call for exclusion is a criminal offence in itself, as neither the CC presently in force, nor the CC in force at the time of committing the act contains such a provision. At the same time, the Metropolitan Court did not address in its judgement either the level and concreteness of the threat or the level of force." [(Metropolitan Court of Appeal) Fővárosi Ítélőtábla 3. BF. 111/2003/10., published at http://www.itelotabla.hu/hatarozat.html]

Upon realising that certain elements of the statutory definition of incitement against a community specified under Section 269 of the CC in force were unclear for those applying the law, the legislature took steps to clearly express the legislative will about the conduct of committing the offence. "Although the Constitutional Court found the expression "incites to hatred" suitable with regard to the protection of fundamental rights, the conduct constituting the offence according to the statutory definition in force calls for an amendment in order to solve the problems related to the interpretation of the law and the application thereof." (Detailed reasoning, Bill No T/5179 on the amendment of the CC)

Based on the opinion expressed by the Constitutional Court in CCDec. 1 and then in CCDec. 2 again, the legislature may only use the tools of criminal law to restrict the freedom of expression in the case of the so-called most dangerous acts which are "capable of whipping up intense emotions in the majority of people", which endanger fundamental rights having a

prominent place among constitutional values, and which may, at the same time, lead to disturbing public peace (the danger is clear and present).

In the opinion of the Constitutional Court, the freedom of expression may not be restricted in such a way that the threshold of punishability considered constitutional is lowered by the respective legal regulation.

According to the intentions of the legislature, the term "provoking hatred" would cover not only the so-called most dangerous acts. "»Provoking hatred« is an act that may include both reasonable arguments and persuasion, and raising instant negative emotions without any reasonable judgement. This is caused by the twofold nature of hatred: it can be an abrupt and passionate emotion but it can be a lasting attitude as well." (Detailed reasoning, Bill No T/5179 on the amendment of the CC)

In addition to introducing the term "provoking hatred", the special provision on calling for the commission of a forcible act and the joint treatment of the two new acts constituting the offence clearly represent the legislature's intention to punish acts that fall outside the scope of incitement on the basis of CCDec. 1. This way, however, the legislature expands the scope of punishable acts to an extent unnecessarily restricting Article 61 para. (1) of the Constitution.

3.3. The petition of the President of the Republic refers to the possibility that the Constitutional Court may provide a normative interpretation of the statutory definition of incitement against a community in line with the provisions of the Constitution. The Constitutional Court has examined the above possibility and established the following:

It was in the holdings of Decision 38/1993 (VI. 11.) AB that the Constitutional Court first declared that during the constitutional review of a statute, instead of annulling the norm, it may adopt a decision on the constitutional requirements that bind everyone when applying the provisions concerned.

The Constitutional Court concluded the above from the interest in sparing the law in force and in refraining from the annulment of a statute or statutory provision in cases where the constitutionality of the legal order and legal certainty can be guaranteed without doing so. [The Constitutional Court set constitutional requirements in, among others, the holdings of Decisions 48/1993 (VII. 2.), 53/1993 (X. 13.), 36/1994 (VI. 24.), 46/1994 (X. 21.), 39/1999 (XII. 21.) AB, and most recently in Decision 32/2003 (VI. 4.) AB.]

However, in the course of a prior constitutional review, the Constitutional Court examines those provisions of the Act adopted by the Parliament that are challenged by the President of the Republic. In this case, there is no valid statute, as the veto by the President of the Republic has resulted in not promulgating and publishing the Act. Thus, the normative text reviewed by

the Constitutional Court is not part of the law in force, and consequently the Constitutional Court cannot be logically expected to spare it.

The same was established in Decision 64/1997 (XII. 17.) AB of the Constitutional Court, stating that the decision adopted after a prior constitutional review "either allows the proposed Act to pass »untouched« into the last phase of the legislative process, i.e. final voting, or – if unconstitutionality is established – it defines a legislative task for the Parliament together with specifying content requirements." (ABH 1997, 380, 387)

Based on the above, in the present case, the Constitutional Court has established that provoking hatred as a new element in the statutory definition violates the freedom of expression granted in the Constitution. The statutory definition under review would allow the punishment of people under criminal law for acts protected by Article 61 para. (1) of the Constitution.

IV

1. The President of the Republic has also objected to the fact that by using the expression "calls for committing a forcible act" the legislature orders the punishment of a preparatory act as an independent and finished offence independently of whether the calling is successful or not. According to the President of the Republic, defining such conduct as an independent offence is unnecessary, since this conduct is part of incitement. However, if the statutory definition of "calling" is interpreted as a purely immaterial offence, it violates Article 61 para. (1) of the Constitution, as the calling itself does not result in a threat to individual rights.

2. On the basis of the second part of Section 269 para. (1) introduced by the CCAm, anyone who in front of a large public gathering calls for committing a forcible act against any nation or any national, ethnic, racial or religious group, or against any group among the population could be held liable under criminal law for felony.

According to the Constitutional Court, it is not unconstitutional in itself that the legislature orders to punish a preparatory act of an offence containing forcible elements as a *sui generis* offence rather than as preparation for an offence. It is within the freedom of the legislature to classify specific acts under specific statutory definitions. "Specifying offences in the Criminal Code and regulating given acts as *sui generis* offences are in each case the normative manifestation of a specific criminal policy." (Decision 481/B/1999 AB, ABH 2002, 998, 1012)

In the present case, the Constitutional Court has not examined the constitutionality of criminalising a preparatory act as a *sui generis* offence, but it has reviewed whether – by introducing the expression in question – the legislature restricted in a constitutional way the freedom of expression granted under Article 61 para. (1) of the Constitution, i.e. whether the conduct constituting the offence termed as "calls for committing a forcible act" complies with the constitutional standard applicable to restricting the freedom of expression.

3. The conduct ordered to be sanctioned does not reach the threshold of punishability specified in point III.2.2 of this Decision. The offence becomes finished by calling for a forcible act. In the dogmatic theory of criminal law, calling is considered to be a unilateral act in the case of which the perpetrator addresses one or several specific persons or the general public and tries to persuade those addressed to commit a criminal offence (in the present case, a forcible act). The new statutory definition of the offence criminalises the act of persuading and even the endeavour to persuade, disregarding whether the call reaches the addressed persons, or whether it results in a will of the passive subject to perform the forcible act (but the forcible act is not committed for any reason) or the passive subject rejects the call of the perpetrator.

It is not part of the criteria for establishing the offence that the call threaten with the violation of specific individual rights. The legislature orders to punish one's mere endeavour to persuade another person or others to commit a forcible act. When a forcible act against persons is realised, the person who has called for committing that forcible act shall be punishable with imprisonment of up to five years on the basis of Section 174/B of the CC as one instigating an offence of violence against a national, ethnic, racial or religious group. [Pursuant to Section 174/B para. (1) of the CC, anyone who assaults somebody else or coerces him with violence or menace to do, not to do or endure something because he belongs or is believed to belong to a national, ethnic, racial or religious group commits a felony and shall be punishable with imprisonment of up to five years.]

In the opinion of the Constitutional Court, the Act, when criminalising the preparatory act, does not take into account the suitability of the call for disturbing public peace. Also in the case of the expression "calls for committing a forcible act", one has to follow the provisions of CCDec. 1 stating 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. This is so because in this case, the existence of an external boundary, i.e. the violation of another right, is itself uncertain." (CCDec. 1, ABH 1992, 167, 180)

In the case of the expression “calls for committing a forcible act”, the offence is deemed to have been committed even without disturbing public peace or even without the call being suitable for disturbing public peace. However, such an abstract threat to public order and peace does not justify the application of a criminal law sanction. “It is not the task of criminal law to protect constitutional values comprehensively; it should only protect such values against particularly grave violations.” (CCDec. 4, ABH 2000, 117, 129)

As the expression “calls for committing a forcible act” does not reach the level of punishability defined in point III.2.2 of this Decision, and the violation of specific individual fundamental rights and disturbing public peace are not preconditions of the offence, this expression is considered an unnecessary and disproportionate restriction of the freedom of expression granted under Article 61 para. (1) of the Constitution.

V

1. The President of the Republic has also claimed the unconstitutionality of paragraph (2) introduced by the CCAm into Section 269 of the CC, on the so-called “disparagement”. According to the petition of the President of the Republic, the offence of “disparagement” violates the freedom of expression as it protects public peace in an abstract and general manner. By adopting this statutory definition, the legislature has significantly extended the scope of prohibited acts beyond the limits set in CCDec. 1 on the basis of Article 61 para. (1) of the Constitution. In addition, the offence of disparagement violates the requirement of the clarity of norms specified in Article 2 para. (1) of the Constitution as it does not clearly define the protected legal object. Although the statutory definition was placed in the CC in the chapter of crimes against public order, under the title of crimes against public peace, it is clear from the text concerned that it is directly aimed at protecting the fundamental right to human dignity, granted in Article 54 para. (1) of the Constitution, as well as the resulting personality rights and, in particular, honour.

According to the President of the Republic, if the protected object is honour, the right to self-determination, as part of the right to human dignity protected under Article 54 para. (1) of the Constitution, is violated as the legislature does not require a private complaint for the prosecution of a criminal offence violating human dignity.

2. With regard to disparagement, the Constitutional Court has first of all examined whether the statutory definition concerned restricts in a necessary and proportionate manner the freedom of expression granted in Article 61 para. (1).

2.1. According to paragraph (2) introduced by the CCAm into Section 269, anyone who hurts human dignity in front of a large public gathering by disparaging or humiliating others on the basis of national, ethnic, racial or religious identity could be punished for misdemeanour.

In examining whether disparagement and humiliation as acts constituting offences reach the limit of punishability, the Constitutional Court followed the statements in CCDec. 1 about the statutory definition of verbal abuse. The reason therefor is that in the case of verbal abuse the conduct constituting the offence was the use of offensive or denigrating expressions, or committing such acts (as the expression of contempt). When adopting the CCAm, the legislature maintained the conduct constituting the offence: using offensive or denigrating expressions (disparagement) or committing similar acts as the expression of contempt (humiliation).

With regard to such acts constituting offences, the Constitutional Court established in CCDec. 1 the following: “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.” (CCDec. 1, ABH 1992, 167, 180-181)

Also, in CCDec. 2 the Constitutional Court annulled the text “or commits any other act suitable for the arousal of hatred” introduced into Section 269 of the CC by Section 5 of Act XVII of 1996 on the grounds of this expression not complying with the requirements of constitutional criminal law demanding clarity and unambiguity, and unnecessary restricting the freedom of expression. Communications below the level of incitement are protected by Article 61 para. (1) of the Constitution as “it is only incitement that incorporates a level of danger »above a certain limit« that allows a restriction of the freedom of expression”. (CCDec. 2, ABH 1999, 106, 110)

Decision 14/2000 (V. 12.) AB of the Constitutional Court on the constitutionality of the statutory definition sanctioning the use of symbols of despotism (hereinafter: CCDec. 3) falls into the group of decisions examining the constitutional limits of political discourse, and in particular the punishability of extreme expressions. According to CCDec. 3, the sanctioning under criminal law of the dissemination, use in front of a large public gathering and public exhibition of symbols of despotism qualify as a constitutional restriction of the freedom of expression, stating that such acts can disturb public peace and can hurt the human dignity of communities committed to the values of democracy. However, CCDec. 3 restricts not the forming of extreme opinions and the communication thereof, but a specific form and mode of

expressing such opinions, i.e. the use of certain symbols. Therefore, CCDec. 3 does not affect the validity of the statement made in CCDec. 1, according to which the mere use of offensive or denigrating expressions, or the commission of similar acts are protected under Article 61 para. (1) of the Constitution which protects opinions without regard to the value or truth of their contents. Similarly to Decision 33/1998 (VI. 25.) AB, a distinction can be made here between evaluating the freedom of expressing one's opinion and the specific forms of presenting such opinion. However, it is stressed by the Constitutional Court in the present case as well that "determining the way of expressing one's opinion can directly influence the enforcement of the human right to the freedom of expression. If […] regulations unreasonably apply severe restrictions on the ways of expressing one's opinion (by applying a low threshold of "tolerance"), this directly impedes the enforcement of the freedom of expression." (ABH 1998, 256, 260-261)

The statutory definition of the violation of national symbols under Section 269/A of the CC sanctions a specific way of expressing one's opinion, and the Constitutional Court established in Decision 13/2000 (V. 12.) AB that it was necessary for the protection of the national symbols defined in the Constitution and the values embodied in them, also establishing the proportionality of the sanction with the desired objective, as there was no other effective legal sanction available. However, the Constitutional Court pointed out in the same decision that "expressing negative opinions concerning the national symbols as well as scientific views, artistic expressions and criticism related to the history, value and public law significance of the symbols, and also putting forward proposals on modifying or cancelling them are naturally out of the scope of criminal sanctioning as they are part of the constitutional freedom of expression." (ABH 2000, 61, 71)

Thus, in accordance with the standing practice of the Constitutional Court, abusive and disparaging communications of opinions below the level of incitement may not be punished as they are protected under Article 61 para. (1) of the Constitution. Expressing contempt does not in itself result in the clear and present danger of a forcible act, and in many cases it does not even pose a threat of violation to individual rights.

2.2. However, it is a significant difference between the statutory definition of verbal abuse annulled in CCDec. 1 and the definition of disparagement examined in the present procedure of the Constitutional Court that in the case of the former, the offence was deemed as committed even if the communication had not resulted, under the given circumstances, in any threat to individual rights.

In contrast, the statutory definition of disparagement is a material offence definitely requiring the violation of human dignity. However, the violation of the right to human dignity in itself does not make it absolutely necessary to apply a special criminal law definition. Although the protection of personality is an important factor to be considered when restricting the freedom of expression, it must also be examined when weighing one fundamental right against another whether the limitation applied by the legislature is absolutely necessary for the protection of personality rights, or an adequate protection of personality can be reached by way of other tools restricting the freedom of expression to a lesser extent.

Based on the law in force, if the injured party can be identified, he may protect his honour by using the existing tools of civil law and criminal law, without regard to being disparaged on the basis of belonging to any group or on the basis of other important attributes or personal features. [Currently, the injured party may sue for the violation of personality rights on the basis of Section 84 para. (1) of the Civil Code, or may initiate a criminal procedure for libel or defamation on the basis of Section 179 or 180 of the CC.]

However, according to Section 85 para. (1) of the Civil Code, personality rights may only be enforced personally, and when denigrating expressions are communicated about a specific community, the courts reject the claims based on personality rights with reference to the lack of the plaintiff's right to sue (as he is not named and cannot be identified as a member of the group concerned).

According to the judicial practice, also libel may only be established if the injured party can be identified concretely as a specific person. "Although it is not necessary to name the person intended to be injured, it is necessary to identify or describe him or her in a way making it clear beyond doubt that the perpetrator has injured the person in question." (BJD 1953-1963, 1190) (Pursuant to Section 47 of Act IV of 1972 already out of force, resolutions in principle had to be made by the courts.) The injured party may initiate a criminal procedure for libel or defamation even if his name was not mentioned in the injurious expression, but only if his identity can be established beyond doubt. (BH1994. 8., BH2001. 99.)

The adoption of Section 269 para. (2) of the CC as introduced by the CCAm represents the legislative intention that when the injured party cannot be identified, and disparagement is based on belonging to a national, ethnic, racial or religious group, the violation of the right to human dignity should in itself justify the action by the public prosecutor and the starting of a procedure *ex officio*. As the statutory definitions of defamation and libel – due to the lack of legitimation of the injured party – may not be applied to the acts defined in the offence of disparagement, the legislature has considered it necessary to adopt a statutory definition under

criminal law ensuring that the injury of personality rights can be remedied if individuals are offended with reference to belonging to a group or community, but the injured party cannot be identified in person.

However, the Constitutional Court holds that the legislature should have taken into account the statement in CCDec. 1 according to which "[…] 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." (CCDec. 1, ABH 1992, 167, 180)

In the present case, by sanctioning disparagement under criminal law in order to protect the right to human dignity and public peace, the legislature has not applied the least restrictive tool with regard to the freedom of expression. Criminal law is the *ultima ratio* in the system of legal liability, and the role of criminal sanctions is the preservation of legal and moral norms when no other legal sanction can be of assistance. (CCDec. 1, ABH 1992, 167, 176) As established by the Constitutional Court in the decision examining the constitutionality of the statutory definition of scare-mongering, "[…] the role of criminal law measures as an *ultima ratio* undoubtedly means that they must be applied if the tools of other branches of law prove insufficient. At the same time, in assessing the above, the Constitutional Court takes into account not only the actual state of the legal system but the potentials of its development as well. The incompleteness of the legal instruments available is not an acceptable argument in itself to declare a certain conduct as a criminal offence; the criminal law restriction of constitutional fundamental rights is made neither necessary, nor proportionate on such grounds." (CCDec. 4, ABH 2000, 117, 129) As there are effective tools for the protection of personality, and in particular for acting against the conducts specified in the statutory definition of disparagement, restricting the freedom of expression to a lesser extent and in a less severe manner, the Constitutional Court holds that in respect of the conducts of disparagement and humiliation, the application of criminal sanctions would disproportionately restrict the freedom of expression granted under Article 61 para. (1) of the Constitution.

2.3. With regard to the statutory definition of disparagement as well, the Constitutional Court has examined whether the disturbance of public peace is more than a presumption by the legislature. In the case of the offence of verbal abuse examined in CCDec. 1, it was not an element of the statutory definition that the offensive expression must be suitable for disturbing public peace, as public order was protected by that statutory definition in an abstract manner.

The same applies to the statutory definition of disparagement. It cannot be declared that all instances of disparagement or humiliation based on national, ethnic, racial or religious identity and violating human dignity pose, at the same time, a clear and present danger to public peace. In the absence of hypothetical or actual feedback (the communication is capable of disturbing public peace, or it has, in fact, disturbed public peace), the disturbance of public peace is a mere assumption which does not sufficiently justify a restriction of the freedom of expression.

Therefore, the Constitutional Court has concluded that the statutory definition of disparagement introduced by the CCAm into Section 269 para. (2) of the CC unnecessarily and disproportionately restricts the freedom of expression granted under Article 61 para. (1) of the Constitution.

In the present case, the Constitutional Court has established the unconstitutionality of Section 1 of the CCAm, in line with Section 35 paras (1) and (2) of the ACC.

With due account to the statements made in the Decision as well as to the consequences thereof, the Constitutional Court has not examined the other objections of content raised by the President of the Republic.

The Constitutional Court publishes this decision in the Official Gazette in view of its content being of public interest.

Dr. András Holló
President of the Constitutional Court

Dr. István Bagi
Judge of the Constitutional Court

Dr. Mihály Bihari
Judge of the Constitutional Court

Dr. Árpád Erdei
Judge of the Constitutional Court

Dr. Attila Harmathy
Judge of the Constitutional Court

Dr. László Kiss
Judge of the Constitutional Court

Dr. István Kukorelli
presenting Judge of the Constitutional Court

Dr. János Strausz
Judge of the Constitutional Court

Dr. Éva Tersztyánszky-Vasadi
Judge of the Constitutional Court