Decision 4/2013 (II. 21.) AB

On a finding of unconstitutionality by conflict with the Fundamental Law and annulment of Section 269/B of Act IV of 1978 on the Criminal Code

In the matter of a constitutional complaint, with concurring reasonings by Justices *dr. András Bragyova, dr. Egon Dienes-Oehm, dr. András Holló, dr. László Kiss* and *dr. Béla Pokol,* as well as dissenting opinions by Justices *dr. István Balsai, dr. Barnabás Lenkovics, dr. Péter Paczolay, dr. Péter Szalay* and *dr. Mária Szívós*, the Plenary Session of the Constitutional Court adopted the following

decision:

The Constitutional Court holds that Section 269/B of Act IV of 1978 on the Criminal Code is contrary to the Fundamental Law and, therefore, annuls it effective of 30 April 2013.

The Constitutional Court shall publish this Decision in the Hungarian Official Gazette.

Reasoning

I

[1] Attila Vajnai, through his legal representative, lodged a constitutional complaint with the Constitutional Court.

[2] On 14 July 2008, the petitioner requested the annulment of the clause "five-pointed red star" in Section 269/B (1) of Act IV of 1978 on the Criminal Code (hereinafter referred to as the "Criminal Code") as part of an ex-post norm control, since, in his view, it infringes freedom of expression. The petitioner explains that the impugned legal provision, the criminal statutory provision of the use of symbols of despotism, criminalises the dissemination, use and display in front of a large public gathering of symbols that were symbols of political dictatorships that violated fundamental human rights. However, the petitioner contends that the five-pointed red star is a complex symbol that has multiple meanings, as it is also used to express the ideas of the workers' movement and also symbolises the fight against fascism. In his view, the red star can be confronted with the swastika at this very point, because in everybody's mind the latter clearly conveys the Nazi ideology and system. In its petition it refers to the Decision 14/2000 (V. 12.) AB of the Constitutional Court, in which the body held

Section 269/B of the Criminal Code to be constitutional, however, in its view, the judgement of the European Court of Human Rights in Vajnai v. Hungary justifies a review of the previous case law of the Constitutional Court, because the argument that "restrictions on freedom of political expression are necessary for the purpose of reinforcing and maintaining democracy" can no longer be upheld.

[3] The petitioner, referring to Order No. XX/1223-1/2012 of the Constitutional Court, submitted his request on 23 February 2012 pursuant to Section 26 (1) and Section 71 (3) of Act CLI of 2011 on the Constitutional Court (hereinafter referred to as the "Constitutional Court Act") as a constitutional complaint through his legal representative.

[4] In his constitutional complaint, the petitioner explains that he was condemned for misdemeanour of using symbols of despotism by Decision No. 16.B.21.571/2004/5 of Central District Court of Pest, Decision No. 25.Bf.7262/2007/6 of Budapest Metropolitan Court and Decision No. Bfv.II.37/2011/5 of the Supreme Court. The Supreme Court also indicated in its decision that the relevant Strasbourg judgement did not repeal Section 269/B of the Criminal Code and, therefore, said Section remains relevant. On this basis, the petitioner alleges that the right guaranteed by Article IX (1) of the Fundamental Law has been violated due to the application of legislation contrary to the Fundamental Law in the court proceedings in his case.

II

[5] In its proceedings, the Constitutional Court took into account the following legal provisions:

[6] 1. Provisions of the Fundamental Law taken into account during the assessment of the petition:

"Article B

(1) Hungary shall be an independent, democratic rule-of-law State."

"Article I

(3) The rules for fundamental rights and obligations shall be laid down in an Act. A fundamental right may only be restricted to allow the effective use of another fundamental right or to protect a constitutional value, to the extent absolutely necessary, proportionate to the objective pursued and with full respect for the essential content of that fundamental right."

"Article IX

(1) Everyone shall have the right to freedom of expression."

[7] 2. The provision of the Criminal Code affected by the petition is as follows:

"Use of Symbols of Despotism

Section 269/B (1) Any person who

a) disseminates;

b) uses in front of a large public gathering; or

c) publicly displays

a swastika, SS insignia, an arrow-cross, the sickle and hammer, a five-pointed red star or any symbol depicting the above is guilty of a misdemeanour punishable with a fine, if such act does not result in a criminal act of a greater degree of gravity.

(2) The person who engages in the act defined in Subsection (1) for informational purposes or the purposes of education, science, or art, or with the purpose of enlightenment about the events of history or the present time, shall not be liable for prosecution.

(3) The provisions of Subsections (1) and (2) shall not apply to the official symbols of States currently in force.

III

[8] 1. The Constitutional Court had previously examined the constitutionality of Section 269/B of the Criminal Code in its Decision 14/2000 (V. 12.) AB (ABH 2000, 83; hereinafter referred to as the "2000 Court Decision"); therefore, firstly, it had to be reviewed whether the petition constituted a "matter judged".

[9] The 2000 Court Decision examined the constitutionality of Section 269/B of the Criminal Code in connection with several provisions of Act XX of 1949 on the Constitution of the Republic of Hungary (hereinafter referred to as the "Constitution"), including freedom of expression. The decision set out in detail the reasons for the creation of this criminal statutory provision. Under the Preamble to Act XLV of 1993 amending Act IV of 1978 on the Criminal Code, and its justification, the extreme political ideas of the twentieth century created dictatorships that disregarded human rights, and the survival of the extreme symbols associated with these dictatorships sensitively affects or offends a significant part of society, and it is therefore necessary to sanction these acts of behaviour under criminal law.

[10] The 2000 Court Decision also assessed the impugned provision of the Criminal Code in the context of freedom of expression. The Constitutional Court found that the dissemination, use in front of a large public gathering and public display of symbols of despotism is a form of political expression whose criminalisation restricts freedom of expression. In this connection, the Constitutional Court reviewed whether the restriction met the requirements of necessity and proportionality. In keeping with the decision, it means a constitutionally permissible restriction of the freedom of expression if "the prohibited conduct not only expresses a political opinion, deemed either right or wrong, but it does more: it endangers public peace by offending the dignity of communities committed to the values of democracy." (2000 Court Decision, ABH 2000, 83, 92.)

[11] With regard to the use of symbols of despotism prohibited by Section 269/B of the Criminal Code, the 2000 Court Decision explained that it leads to the formation of ideas associated with despotic regimes and the associated sense of being threatened, which is likely to disturb public peace. However, freedom of expression may be restricted if this is necessary in a democratic society to protect public safety, prevent disorder or crime, or to protect others. In line with the position of the Constitutional Court expressed in the 2000 Court Decision, Section 269/B of the Criminal Code serves not only the statutorily protected legal interest of criminal law but also the protection of other constitutional values, such as the democratic rule-of-law State or the requirement that the law should treat everyone a persons of equal dignity.

[12] The 2000 Court Decision also mentioned that in a given historical situation, the system of criminal law instruments provides effective protection (as *ultima ratio*). On the basis of the above, the Constitutional Court found that "it is indeed the protection of democratic society and, therefore, not unconstitutional if, in the present historical situation, the State prohibits certain acts of conduct contrary to democracy, connected to using particular symbols of despotic regimes: their dissemination, use in front of a large public gathering, and public display... [T]he restriction specified in Section 269/B (1) of the Criminal Code 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 means applicable and, therefore, the restriction of the fundamental right defined in the given provision of the Criminal Code is in compliance with the requirement of proportionality." (2000 Court Decision, ABH 2000, 83, 98, 100-101.)

[13] 2. Pursuant to Section 31 (1) of the Constitutional Court Act, if the Constitutional Court has already ruled on the conformity of an applied legal rule or a legal provision thereof with the Fundamental Law based on a constitutional complaint or judicial initiative, no constitutional complaint or judicial initiative aimed to declare a conflict with the Fundamental Law may be admitted regarding the same legal rule or legal

provision thereof and the same right guaranteed by the Fundamental Law, with reference to the same constitutional law context, unless the circumstances have changed fundamentally in the meantime. In consonance with the previous case law of the Constitutional Court, an issue is considered to be a matter judged only if a new petition is submitted for the same legal provision on the same ground or in the same context. (Decision 1620/B/1991 AB, ABH 1991, 972, 973.)

[14] Article 31 (3) of the "Transitional Provisions of the Fundamental Law of Hungary" repealed Act XX of 1949 on the Constitution of the Republic of Hungary, as amended several times, effective as of 1 January 2012. The previous Constitution is replaced by the Fundamental Law. Regarding the applicability of its decisions rendered prior to the entry into force of the Fundamental Law, the Constitutional Court emphasised that under the Fundamental Law, the Constitutional Court is responsible for keeping guard over the Fundamental Law. In new cases, the Constitutional Court may use the arguments contained in its previous decision made before the entry into force of the Fundamental Law in connection with the constitutional issue decided at that time, provided that this is possible on the basis of specific provisions and rules of interpretation of the Fundamental Law with the same or similar content as the previous Constitution. The statements of principle significance expressed in the decisions of the Constitutional Court based on the previous Constitution shall also apply *mutatis mutandis* in the decisions of the Constitutional Court interpreting the Fundamental Law. (Decision 22/2012 (V. 11.) AB, Reasoning [39] and [40]; Decision 30/2012 (VI. 27.) AB, Reasoning [14])

[15] Irrespective of their date of origin, all applicable legal acts, or those applicable in cases involving a judicial initiative or a constitutional complaint, must comply with the Fundamental Law. [The Constitutional Court took the same view regarding the relationship between the Constitution and the "pre-constitutional" and "post-constitutional" law in Decision 11/1992 (III. 5.) AB (ABH 1992, 81.).] Although the unconstitutionality of a piece of legislation does not mean that it is contrary to the Fundamental Law, the arguments contained in previous decisions of the Constitutional Court also apply in new cases, provided that they are based on the same or similar provisions of the Fundamental Law. On the basis of the foregoing, in the event of a substantive concurrence of certain provisions of the previous Constitution and the Fundamental Law, a petition based on the same constitutional fundamental right or legal principle (value) objecting to the same legal act or legal provision shall be deemed a matter judged (*res judicata*).

[16] In the present case, the petitioner invokes freedom of expression. The right to freedom of expression is enshrined in Article 61 (1) of the Constitution and Article IX (1) of the Fundamental Law with identical content. On this basis, the Constitutional Court

finds that the assessment of the constitutionality of Section 269/B of the Criminal Code in the 2000 Court Decision is also relevant in the present case.

[17] 3. However, the principle of a matter judged is only a relative limitation on the Constitutional Court. It is also justified for the Constitutional Court to retain the possibility to re-conduct a constitutional review in the same constitutional context, taking into account the changing circumstances. This is also ensured by the Constitutional Court Act itself by allowing an exception to the rule of the matter judged in case the circumstances, in particular the issues of fact and law, have fundamentally changed.

[18] The Constitutional Court has already ruled on the constitutionality of Section 269/B of the Criminal Code in the context of freedom of expression. However, following the judgment in the 2000 Court Decision, the European Court of Human Rights (hereinafter referred to as the "Human Rights Court") delivered its judgement in Vajnai v. Hungary (Application no. 33629/06) concerning the impugned statutory provision.

[19] The judgement of the Human Rights Court is declarative, that is, it does not directly entail a change in legal issues, but the Human Rights Court's practice may be of assistance to interpret the constitutional fundamental rights enshrined in the Fundamental Law and the international convention, and to determine their content and scope. The meaning of the rights guaranteed by the European Convention on Human Rights (hereinafter referred to as the "Convention") is embodied in the decisions of the Human Rights Court in individual cases, which promotes a uniform interpretation of human rights. Taking into account the Convention and the practice of the Human Rights Court must not lead to the restriction of the protection of fundamental rights under the Fundamental Law, to the determination of a lower level of protection. The Strasbourg practice, as well as the Convention, sets out the minimum level of protection of fundamental rights that all States Parties must provide, but national law may establish a different, higher set of standards for the protection of human rights.

[20] In view of the foregoing, the Constitutional Court found that the judgement of the Human Rights Court in Vajnai v. Hungary, which contains findings in relation to Section 269/B of the Criminal Code (*see* Point IV.2.2.2), constitutes a legally significant new circumstance and aspect, which necessitates reconsideration of the review of constitutionality.

IV

[21] 1. The use of symbols of despotism was incorporated into Section 269/B of the Criminal Code by Section 1 of Act XLV of 1993 on the Amendment of Act IV of 1978 on the Criminal Code. Under the Preamble to the Act and its justification, the creation of the new statutory definition was justified by the fact that the survival of symbols and symbols associated with the extreme dictatorial systems established in the 20th century may harm a significant part of society and damage the country's reputation. The object of criminal law protection is the protection of public peace and human dignity.

[22] Section 269/B of the Criminal Code exhaustively determines which symbols qualify as symbols of despotism under the statutory definition. These are the swastika, SS insignia, the arrow cross, the sickle and hammer, and the five-pointed red star. In connection with the use of symbols of despotism, the Criminal Code criminalises the conduct of dissemination, public display and use in front of a large public gathering to be unless a crime of a greater degree of gravity is committed. The use of symbols of dictatorship is an abstract threatening crime, and the acts of behaviour related to the specifically mentioned symbols of despotism are punishable regardless of any other considerations.

[23] However, in line with the legislator's intention in the justification to the law, the commentary literature interprets the facts as meaning that the symbols listed in the Act are associated with ideas and events that involve the violent seizure and dictatorial maintenance of power. The dissemination, use in front of a large public gathering or public display of the symbols listed in Section 269/B of the Criminal Code shall be punishable under the statutory definition if the symbols, as symbols of arbitrary rule by the State symbolise or promote behaviour that is closely related to the dictatorial systems of the twentieth century. There is an example of this teleological interpretation in judicial practice (BH2009. 131).

[24] 2. The Constitutional Court has presented an overview on the criminal law regulations of each European country regarding the abuse of symbols of despotism, as well as the relevant case law of the Human Rights Court.

[25] In its Decision 1/2013 (I. 7.) AB, the Constitutional Court stated that "the assessment of the constitutionality of a legal institution in another country may differ depending on the constitution of the given state, the incorporation of regulations into the legal system and the historical and political background. Therefore, while acknowledging that the consideration of foreign experience may also be helpful in judging a regulatory solution, the Constitutional Court cannot consider the example of a foreign country in determining the compatibility with the Constitution (Fundamental Law) to be decisive." (Reasoning [31]). In the present case, the Constitutional Court also maintains that, although the presentation of the regulations of other countries is not decisive for the assessment of compliance with the Fundamental Law, the description

of foreign solutions may contribute to the assessment of the reasonableness of a criminal prohibition.

[26] 2.1. Forms of hatred based on nationality, race, ethnicity, religion are banned in many European countries, but the use of symbols of totalitarian dictatorships is punishable in only a few States. Most European countries prohibit the public use of National Socialist symbols, including the swastika, the flags and anthem of Nazi Germany. However, symbols of the communist system were forbidden for the most part in the former socialist countries. The applicable sanction is usually a fine (in Lithuania), but there is also a threat of imprisonment (for example, in Germany, Italy or Slovakia).

[27] In Germany, the Criminal Code (Strafgesetzbuch - StGB) does not contain an exhaustive list of prohibited symbols similar to the Hungarian legislation. Section 86a of the StGB prohibits the dissemination and public use of symbols of organisations (parties or associations) classified as unconstitutional. The statutory provision defines in particular that a flag, a badge, a uniform, a password, a form of greeting and similar expressions are to be regarded as a symbol. An exception to the prohibition is if the dissemination or public use of the symbols is for artistic, scientific, educational, research, or informational purposes or the protection against unconstitutional endeavours. The law also contains a clause that if the danger of the act to society is low, the court may dispense with the application of the penalty.

[28] Thus, the German legislation did not define the prohibition by prohibiting the use of symbols associated with specifically mentioned political systems, but by imposing it regarding organisations declared unconstitutional. Based on this, the National Socialist symbols cannot be used and disseminated publicly in Germany, but the red star is not banned because it is a symbol of several legitimate organisations. The German Federal Constitutional Court has reviewed the constitutionality of Section 86a of the StGB and has not found it to be contrary to the German Basic Law [1 BvR 680/86 vom 3. 4. 1990, 1 BvR 204/03 vom 23. 3. 2006, 1 BvR 150/03 vom 1. 6. 2006, 2 BvR 2202/08 vom 18. 5. 2009].

[29] In Italy, a separate statute (Legge 25 giugno 1993, n. 205.) criminalises the public display of right-wing dictatorial symbols associated with prohibited organisations, associations and movements as defined by the Anti-Racism Act. The constitutional basis of this rule is Article XII of the Italian Constitution, which prohibits the reorganisation of the fascist party. The Italian Constitutional Court has not assessed the constitutionality of this statute, but has ruled in another case that freedom of expression does not protect opinions which are about the reorganisation of the disbanded fascist party, its support or the act of identifying with it, because the public use of the symbols associated with them is susceptible to influence the masses and can

be seen as supporting the reorganisation of illicit organisations. Therefore, the Italian Constitutional Court has ruled that the punishment of such conduct can be considered a justified restriction to ensure the protection of democracy [Sentenza 74/1958(20/12/1958)].

[30] In Slovakia, Sections 421 and 422c of Act 300/2005 of 20 May 2005 on the Criminal Code (Trestný Zákon) provides for the suppression of movements that suppress liberties, which includes the prohibition of symbols associated with such movements, including badges, flags and uniforms. The Slovak legislation, similarly to the German regulation, does not define which regimes and movements it specifically prohibits, but defines it in general, so the prohibition can be applied to both National Socialist and communist symbols.

[31] In Lithuania, on 18 June 2008, the parliament adopted an amendment to the law banning the National Socialist swastika and all public depictions of communist symbols used in the former Soviet Union.

[32] In Latvia, the law on the right of assembly prohibits the public use of communist symbols.

[33] In Romania, a ban on fascist symbols and xenophobic acts was introduced in 2002.

[34] In 2009, Poland amended its penal code to criminalise the use of fascist, communist and other totalitarian symbols. The regulation entered into force on 8 June 2010. However, in its decision of 19 July 2011, the Polish Constitutional Court declared unconstitutional the part of the statutory definition concerning the prohibition of fascist, communist and other totalitarian symbols, on the grounds that, in the light of the judgment of the Strasbourg Court in Vajnai v. Hungary, it infringes the principle of *nullum crimen sine lege* and, in that context, freedom of expression.

[35] In the Ukraine, on 26 April 2012, the Ivivian Assembly and on 9 May 2012 the President of the Ternopil District of Western Ukraine ordered the banning of communist and National Socialist symbols.

[36] In 2005, the possibility arose of banning National Socialist symbols, in particular the swastika, at EU level, which was envisaged in 2007 during the German Presidency. Several Central and Eastern European countries, including Hungary, Estonia, Latvia, Lithuania, the Czech Republic, and Slovakia, would have supported extending the ban to include symbols of communism.

[37] Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law was adopted on 28 November 2008 in order to combat crime related to racism and xenophobia [Official Journal L 328., 6.12.2008], however, this did not include a provision to regulate the prohibition of authoritarian symbols at EU level.

[38] 2.2 The Human Rights Court assessed the compatibility with the Convention of crimes with respect to the National Socialist and communist regimes in the context of Article 10 of the Convention.

[39] 2.2.1 Pursuant to Article 10 of the Convention, "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers..." However, Article 10 , paragraph 2, allows this right to be restricted in cases "which 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."

[40] The Constitutional Court has examined the Human Rights Court's developed practice on freedom of expression, in particular decisions which have declared certain manifestations to be incompatible with the values of the Convention or which contain findings concerning crimes related to the National Socialist and Communist regimes.

[41] In the practice of the Human Rights Court, freedom of expression is one of the basic pillars of a democratic society, its progress and the development of the individual. This freedom also applies to opinions that are offensive, astonishing, or create cause for concern. This is required by pluralism, tolerance and enlightenment, without which a democratic society is inconceivable. (H. R. Handyside v. the United Kingdom, judgement of 7 December 1976, Series A no. 103; Jersild v. Denmark, judgement of 23 September 1994, Series A no. 298; Zana v. Turkey, judgement of 25 November 1997, Reports 1997-VII; 151.)

[42] According to the consistent practice of the Human Rights Court, exceptions to freedom of expression "must be narrowly interpreted" and "the necessity for any restrictions must be convincingly established". (For example, The Observer and The Guardian v. the United Kingdom, judgement of 26 November 1991, Series A no. 216.) The Human Rights Court provides a wide margin of appreciation for States in deciding what constitutes a necessary restriction in a democratic society. (For example, Barfod v. Denmark, judgement or 22 February 1989, Series A no. 149; Markt intern Verlag GmBH and Klaus Beermann v. Germany, judgement of 20 November 1989, Series A no. 165; Chorherr v. Austria, judgement of 25 August 1993, Series A no. 266-B; Casado Coca v. Spain, judgement of 24 February 1994, Series A no. 285-A; Jacubowski v. Germany, judgement of 23 June, 1994, Series A no. 291-A.) The practice of the Human Rights Court also takes into account how the historical past or present of the Member State concerned may influence the permissible purpose and necessity of restricting the

expression of an opinion. (Rekvényi v. Hungary, judgement of 20 May 1999, Court Reports 99/12, 955.)

[43] It is important to stress, however, that Article 17 of the Convention states that "[n]othing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention." In several cases, the Human Rights Court declared the application inadmissible, citing Article 17, in which the applicants, groups having a proclivity for despotism, invoked freedom of expression to justify the publication of texts that violated the spirit of the Convention and the fundamental values of democracy. (Especially, for example, Glimmerveen and Hagenbeek v. the Netherlands, Commission decision of 11 October 1979, DR 18, 198; Pierre Marais v. France, Commission decision of 24 June 1996 DR 86, 184; Witzsch v. Germany, decision of 20 April 1999, Appl. no. 41488/98; Garaudy v. France, Admissibility decision of 24 June 2003, ECHR 2003-IX; Pavel Ivanovv. Russia, Admissibility decision of 20 February 2007, Appl. no. 35222/04.) However, the Human Rights Court does not protect other ideologies that are incompatible with the purpose and values of the Convention if their manifestations clearly demonstrate an abuse of the Convention and are in fact aimed at destroying the set of values of the Convention (e.g. terrorism).

[44] With regard to the criminal law restrictions on freedom of expression, the Human Rights Court has consistently emphasised that compatibility with the Convention should take into account the clarity of the norm, its clear national practice, as well as several factors in the specific case (e.g. geographical location, date and political context of the declaration, status of the person making the declaration). The Human Rights Court has also attached importance to whether there is a consistent identification with totalitarian ideology.

[45] 2.2.2 In Vajnai v. Hungary, the Human Rights Court did not classify the application as falling under Article 17 of the Convention, as in its view it could not be justified that the wearing of the Red Star was intended to justify or promote totalitarian repression against "groups with totalitarian ambitions". (Judgement in Vajnai, paragraph 25.) On the basis of the "necessity in a democratic society" test, the Human Rights Court assessed whether the restriction of the freedom of expression in the given case, pursuant to Section 269/B of the Criminal Code, met a pressing social need.

[46] In contrast to Rekvényi v. Hungary, the Human Rights Court considered that, two decades after the transition to pluralism, the country could be considered a stable democracy. In the present situation, therefore, it cannot be argued that the specific circumstances of the transition to democracy justify the restriction. In his view, there is no evidence that there is currently a real danger of the restoration of the communist

dictatorship by any political movement or party. (Judgement in Vajnai, paragraphs 48 and 49.) The Human Rights Court acknowledges that historical events associated with communism, the display of such symbols, cause pain to victims and their families, nevertheless considers that such sentiments, however understandable, cannot alone set the limits of freedom of expression. (Judgement in Vajnai, paragraph 57.)

[47] In its judgement, the Human Rights Court continued to maintain that States have a wide discretion in restricting freedom of expression, but did not address the question of the extent of that discretion in restricting the freedom of expression of politicians. In the Human Rights Court's view, restrictions on freedom of expression, especially in the case of political speeches, must be carried out with the utmost care and can only be justified by a clear, pressing and specific social need. This should be taken into account in particular in cases where symbols which have multiple meanings are involved, as a blanket ban on such symbols may also restrict the use of symbols in contexts in which the restriction cannot be justified. (Judgement in Vajnai, paragraph 51.)

[48] The Human Rights Court is mindful of the fact that the red star cannot be understood as representing exclusively communist totalitarian rule, as it remains a symbol of the international workers' movement as well as of some lawful political parties. The Human Rights Court also considers that wearing the red star does not exclusively mean an identification with totalitarian ideas. In light of this, the Human Rights Court considered that the prohibition contained in Section 269/B of the Criminal Code was too broad, as it also covered activities and ideas which were clearly protected by Article 10 of the Convention. In the Human Rights Court's view, the containment of a mere speculative danger, as a preventive measure for the protection of democracy, cannot be seen as a "pressing social need". The Human Rights Court also complained that the impugned provision of the Criminal Code did not require proof that the actual display amounted to totalitarian propaganda, which also supported the unacceptably broad nature of the statutory provision. (Judgement in Vajnai, paragraphs 52 to 56.) In its judgement of 3 November 2011 in Fratanoló v. Hungary (Application No. 29459/10), the Human Rights Court summarized and upheld its findings in Vajnai.

[49] In its judgement of 24 July 2012 in Fáber v. Hungary, the Human Rights Court confirmed its position in Vajnai that assuming that the Árpád-striped flag in question has multiple meanings, that is, it can be regarded both as a historical symbol and as a symbol reminiscent of the Arrow Cross regime, it is only a careful examination can determine which statements relating to which meaning fall within the protection of Article 10 of the Convention which are still tolerable in a democratic society. (Fáber v. Hungary, judgement of 24 July 2012, Application no. 40721/08, paragraph 54.)

[50] The Human Rights Court also recognises that expressions related to such symbols cannot be considered equally permissible at any place and time. In certain countries with a traumatic historical experience comparable to that of Hungary, the protection of the right to honour of the murdered and the piety rights of their relatives may necessitate an interference with the right to freedom of expression, and it might be legitimate when the particular place and time of the otherwise protected expression unequivocally changes the meaning of a certain display. (Judgement in Fáber v. Hungary, paragraph 58. Similar considerations apply if the expression, because of its timing and place, amounts to the glorification of war crimes, crimes against humanity or genocide. Garaudy v. France, Admissibility decision of 24 June 2003, ECHR 2003-IX.)

V

[51] The petition is well-founded.

[52] 1. The petitioner sought annulment of the clause "five-pointed red star" of Section 269/B of the Criminal Code, citing the violation of the freedom of expression. Pursuant to Section 52 (2) of the Constitutional Court Act, the assessment conducted by the Constitutional Court is limited only to the specified constitutional request, which does not affect the competences of the Constitutional Court that may be exercised *ex officio*. However, Section 52 (3) of the Constitutional Court Act also allows the assessment and annulment of other provisions the substance of which is closely connected to the legal provision indicated in the petition, if failure to do so were to infringe legal certainty.

[53] The criminal statutory provision of the use of symbols of despotism is intended to criminalise extreme conduct related to symbols of dictatorships, regardless of which symbols associated with the dictatorial system are the objects of the *actus reus*. The statutory provision does not distinguish between conduct related to the symbol of the National Socialist or communist dictatorships, but declare the same conduct punishable under the same conditions for all the symbols listed in the statutory provision. In view of the above, it can be stated that in addition to the five-pointed red star, the other symbols listed in Section 269/B of the Criminal Code, the swastika, SS insignia, the arrow cross and the sickle and hammer share the legal fate of the five-pointed red star; therefore, due to the close connection, the Constitutional Court extended the constitutional review to the examination of the compliance of the complete statutory provision of the use of symbols of despotism with the Fundamental Law.

[54] 2. Dissemination of symbols of despotism, their use in front of a large public gathering, and their public display is a form of political expression. Thus, Section 269/B of the Criminal Code, which prohibits the dissemination, use in front of a large public gathering and public display of certain symbols of despotism, restricts freedom of expression. The subject of the present review is whether the method of criminal law restriction implemented in Section 269/B of the Criminal Code is in accordance with the Fundamental Law.

[55] The Constitutional Court has emphasised in previous decisions that the constitutional requirements of the criminal justice system as a whole must prevail in addition to the general findings and principles on the limitation of fundamental rights when assessing the constitutionality of restricting freedom of expression by criminal law means. These formal and substantive constitutional requirements were derived by the Bench from the rule of law contained in Article 2 (1) of the Constitution as a basic value. [Decision 30/1992 (V. 26.) AB, ABH 1992, 167, 176.; Decision 12/1999 (V. 21.) AB, ABH 1999, 106, 112.]

[56] Article B (1) of the Fundamental Law declares in the same way as the Constitution that Hungary is an independent, democratic state under the rule of law. The content of Article XXVIII (4), which lays down the related principles of criminal law, is also identical to the content of Article 57 (4) of the Constitution. Therefore, in connection with "constitutional criminal law", that is, the constitutional limitations of criminal law, the relevant findings of principle significance expressed in the decisions of the Constitutional Court remain relevant.

[57] 2.1 The social purpose of criminal law is to be a "sanctioning keystone" for the legal system as a whole. Criminal law is considered *ultima ratio* in the system of legal liability, that is, the criminal sanction, the role and purpose of the punishment is to maintain the integrity of legal and moral norms when sanctions from other branches of law are no longer of assistance. The substantive requirement arising from constitutional criminal law, that is, the constitutional limitations of criminal law, is that the legislator may not act arbitrarily when determining the scope of conduct to be punished, but the need to declare a conduct punishable must be judged by a strict standard. In order to protect different areas of life, moral and legal norms, it is justified to use a system of criminal law instruments that necessarily restricts human rights and freedoms only in absolutely necessary and proportionate ways, if the protection of state, social, economic objectives and values is not otherwise possible.

[58] The Constitutional Court finds that the criminal law threat of the use of symbols of despotism may be justified, for behaviour associated with the symbols associated with the extreme political dictatorships of the twentieth century may, on the one hand,

sensitively affect or violate human dignity and, on the other hand, be contrary to the constitutional order of values deriving from the Fundamental Law.

[59] 2.2 An important constitutional limitation under the Fundamental Law of criminal law is that the disposition describing the conduct prohibited by the prospect of a criminal sanction must be definite, delimited, and clearly articulated. An important requirement arising from Article B (1) and Article XXVIII (4) of the Fundamental Law is the clear expression of the legislative will regarding the protected legal interest and the *actus reus*, which should contain a clear message as to when a criminally sanctioned infringement will take place, while limiting the possibility of arbitrary interpretation by the law enforcement authorities. [From previous constitutional court precedent, see Decision 30/1992 (V. 26.) AB, ABH 1992, 167, 176.; Decision 12/1999 (V. 21.) AB, ABH 1999, 106, 110-111.; Decision 95/2008 (VII. 3.) AB, ABH 2008, 782, 786.]

[60] In the present case, it is therefore necessary to assess whether the criminal statutory definition of the use of symbols of despotism complies with the constitutional limits of criminal law, that is, whether the facts clearly, delimitably and clearly articulate the range of conduct to be punished. The fact that the statutory definition is uncertain may entail the possibility of an arbitrary restriction on the right to freedom of expression.

[61] The institutional protection obligation of the State to protect fundamental rights may justify State intervention in a proportionate, that is, constitutionally justified, way. In order to protect human dignity and the constitutional order and values, the Constitutional Court considers it a legitimate aim for the legislator to prohibit conduct that is contrary to these by criminal law. However, the legislator must ensure the functioning of a legal institution with a precise definition and safeguards against arbitrary application of the law if the legal institution involves a restriction of a fundamental right. The public formulation, dissemination of views expressing identification with dictatorial regimes or criminalisation of similar purported conduct may be constitutionally acceptable, if the criminal law is sufficiently precise, specific and definite to ensure that it does not constitute a disproportionate interference with freedom of expression or that the statutory definition is related to a scope as narrow as possible in order to achieve the aim pursued.

[62] However, the Constitutional Court found that Section 269/B of the Criminal Code defines the scope of conduct to be punished too broadly because it does not differentiate, but the use of symbols is generally punishable, although consideration of the intent, mode of commission, or result produced would be essential for each symbol. Generally declaring the use of symbols a punishable offence will lead to conduct, the criminalisation of which disproportionately restricts freedom of expression, also punishable.

[63] 3. Indeterminacy, which gives rise to concern with respect to legal certainty, is reflected in the possibility of arbitrary interpretation and application of the law. The Constitutional Court has already attached great importance in its previous practice as to whether there is an established judicial practice available to respond to the question assessed by it, which, in rendering its decision, assists those applying the law to the extent necessary for legal certainty. [Decision 47/2003 (X. 27.) AB, ABH 2003, 525, 535.]

[64] 3.1 In the present case, however, the Constitutional Court has found that the scarce case law related to Section 269/B of the Criminal Code is contradictory. There are court decisions that establish the commission of a crime in the event of the occurrence of statutory provision elements, however, a number of decisions to the contrary have been made which, despite such existence of statutory provision elements, failed to establish a criminal offence in the absence of the intent of propagating despotic regimes.

[65] The early court decisions following the insertion of the statutory provision contained in Section 269/B of the Criminal Code assessed primarily the implementation of the statutory provision elements, exceptionally taking into account whether the act was in fact suitable for endangering public peace. The courts have found on several occasions that the hoisting of the flag with the despotic symbol at night has rendered the despotic symbol publicly displayed. (Decision No. 12.B.XI.370/1994 and Decision No. 26.Bf.XI.8264/1994/5 of Budapest Metropolitan Court.)

[66] In another case in 2006, Szentendre Municipal Court ruled that "although the display of objects which undoubtedly include symbols of despotism [...] has been carried out in accordance with the statutory provision, [...] such acts do not pose a danger to society, the specific act was not dangerous to society at the time it was committed and the public display was intended solely for sale to commercial, collectors or purchasers, free from the above-mentioned propaganda accompanied by an identification motive." (Judgement No. 3.B.102/2004/53) However, the appellate court reversed the judgement of the trial court, arguing that the statutory provision of the use of symbols of despotism as a criminal offence does not include the intent of prohibiting illicit ideas; therefore, the findings of the court of first instance for the purpose of identifying and propagating with ideologies are not in accordance with the statutory provision set forth in Section 269/B of the Criminal Code. (Judgement No. 3.Bf.48/2007/15. Pest County Court)

[67] Budapest Regional Court of Appeal elected a unique solution to resolve the contradiction, as it interpreted the intent in the context of the *actus reus* of dissemination. Budapest Regional Court of Appeal, as a court of third instance, explained that "among the crimes against public peace, the crimes have been codified which incorporate, in principle, a direct or indirect attack on public peace, thereby

disrupting the tranquility of the social atmosphere, cause unrest and confusion among citizens who respect the rule of law [...] A symbol is the designation of an idea, person, or event by means of insignia or image, the purpose of which is to enable the sign and the signalled ideas, persons, or events to be related to each other by their common features. That is why there is always some conscious and emotional connection to the display and perception of such symbol." Therefore, the court found that "dissemination as an *actus reus* is manifested only if there is a conscious and emotional motive attached to the sale." On this basis, since the defendants, without the intention of disseminating the despised ideologies, carried out sales solely for profit, the court acquitted the defendants in the absence of a crime. (Judgement No. 3.Bhar.159/2008/7 of Budapest Regional Court of Appeal.)

[68] In a subsequent case involving an extraordinary procedural remedy, the Supreme Court assessed the lack of intent as a lack of danger to society of the crime and, on that basis, acquitted the accused. In the case, the court of first instance found a criminal offence because, in its view, the affixing of political posters depicting symbols of despotism is provocative and offensive, whatever its message, establishes the statutory provision set forth in Section 269/B (1) (c) of the Criminal Code. The appellate court upheld the trial court's decision. However, in the review proceedings, the Supreme Court, unlike the courts of first and second instance, held that although the statutory provision elements of the offence had been established, its assessment alone was not sufficient to establish the offence. In line with the decision of the Supreme Court, on the basis of the perpetrator's intention, evaluation and assessment of the specific circumstances of the offence, it can be judged whether the specific act constitutes a threat to or, violation of, the legal order. In the specific case, the Supreme Court ruled that if there is a lack of "promoting the survival of symbols, keeping them in the public consciousness, promoting them", then in the case of the defendant there is a lack of "identification with despotic regimes and despised ideologies." Accordingly, the court found that although the conduct of the defendants was formally in accordance with the statutory provision, it was not suitable for inciting fear, causing a threatening effect, and thus endangering the protected interest, public peace, therefore no crime had been committed. (Decision No. Bfv.III.1037/2006/5 of the Supreme Court, BH2009. 131.)

[69] Regional Court of Appeal of Pécs, as a court of third instance, took the opposite view a year later. The court acknowledged that acquittals based on the lack of danger to society were relatively rarely and extremely narrowly accepted, but held that "the limits of the grounds for preclusion of criminal punishability cannot be extended beyond this, without prejudice to legality. It is therefore irrelevant for what purpose the offender disseminates, uses or displays publicly the symbol with occasionally multiple meanings." The court further argued that the criminal offence was formulated in the

form of a statutory provision known as conduct-related statutory provision (without result), which means that by engaging in the criminal conduct (*actus reus*) that has been declared punishable, the criminal offence is realised, no further condition or specific result is required for therefor. On this basis, the court found the accused guilty in view of the realisation of the statutory provision elements in the specific case; however, the court issued a reprimand to the accused due to the low danger of the act to society. (Judgement No. Bhar.II.2/2010/4 of Pécs Regional Court of Appeal)

[70] 3.2 The presented legal cases support what the Constitutional Court has already pointed out in an earlier decision that not only overly general (abstract) wording violates the principle of legal certainty, but also if the legal framework of the law enforcement decision is not defined by the legislator, or if defined, it is done so in such an overly broad manner that enables those that implement the law to make a decision almost entirely at their own discretion. This paves the way for subjective, arbitrary application of the law in the same way as when the legislator drafts the text of the applicable norm in a way that violates the clarity of the norm. [Decision 109/2008 (IX. 26.) AB, ABH 2008, 886, 913.]

[71] 4. The Constitutional Court has established that the statutory provision of the use of the symbols of despotism contained in Section 269/B (1) of the Criminal Code does not comply with the limits of criminal law contained in the Fundamental Law, that is, the requirements of constitutional criminal law. The requirements that can be deduced from Article B (1) of the Fundamental Law can be established in terms of the determinacy, accuracy and clarity required of the statutory definitions of criminal offences of the Criminal Code that in the case of conduct that amounts to the use of symbols of despotism, those applying the law must take into account an unacceptably large number of contradictory circumstances, such as the justification of the Code, contradictory case-by-case decisions and commentaries, when deciding on criminal liability.

[72] The contradiction is further exacerbated by the Human Rights Court's legal interpretation of Section 269/B of the Criminal Code. The direct application of Human Rights Court judgements in criminal proceedings, that is, the application of a Strasbourg judgement in a domestic case on a complaint based on the same case as a whole, is possible only after the final conclusion of the proceedings, in the review procedure. This also means that the courts must adjudicate the acts on the basis of the Hungarian law in force, even if the facts of the case are completely identical to the case adjudicated by the Strasbourg judgement.

[73] On the basis of all this, the Constitutional Court found that Section 269/B of the Criminal Code breaches Article B (1) of the Fundamental Law and, in this context, Article IX (1).

[74] 5. A legal act or legal provision annulled by the Constitutional Court shall, as a general rule, be repealed on the day following the publication of the decision of the Constitutional Court on annulment in the Official Gazette pursuant to Section 45 (1) of the Constitutional Court Act, and shall not apply from that date, and legislation promulgated but not entered into force shall not enter into force. However, the Constitutional Court may, departing from the general rule, determine the repeal of legislation contrary to the Constitution or the inapplicability of the annulled legal act in general or individual cases, if this is justified by the protection of the Fundamental Law, legal certainty or a particularly important interest of the entity initiating the proceedings [Section 45 (4) of the Constitutional Court Act].

[75] The Constitutional Court has also emphasised in its previous decisions that, in the interests of legal certainty, it may not close the legal vacuum in a given area of regulation, and therefore leaves time for the legislator to create new regulations with future annulment in order to avoid legal gaps. [Decision 13/1992 (III. 25.) AB, ABH 1992, 95, 97.; Decision 22/1992 (IV. 10.) AB, ABH 1992, 122, 125.; Decision 29/1993 (V. 4.) AB, ABH 1993, 227, 233.; Decision 64/1997 (XII. 17.) AB, ABH 1997, 380, 388.] In line with its previous case law, the Constitutional Court takes the view that *pro futuro* annulment serves legal certainty in the event that the unconstitutionality by non-conformity with the Fundamental Law is declared in such a way that the Constitutional Court considers it justified to create new regulations instead of legislation that is in conflict with the Fundamental Law. If the temporary maintenance of a law contrary to the Fundamental Law poses less of a threat to the integrity of the legal system than immediate annulment, future annulment is warranted. [See previously, Decision 47/2003 (X. 27.) AB, ABH 2003, 525, 550.; Decision 132/2008 (XI. 6.) AB, ABH 2008, 1080, 1091.]

[76] In determining the date of annulment, the Constitutional Court took into account that with the annulment of Section 269/B (1) of the Criminal Code, certain conduct previously declared punishable by the legislator remains unregulated.

[77] The definition of punishable conduct and its legal consequences is a matter of criminal policy that falls within the legislative competence; therefore, the Constitutional Court decided on future annulment on 30 April 2013, leaving time for the legislator to adopt new regulation in accordance with the Fundamental Law.

[78] With the annulment of Section 269/B (1) of the Criminal Code, Section 269/B (2) and (3) become inapplicable as they refer to Subsection (1). In view of this, the Constitutional Court, due to the close substantive connection, annulled Section 269/B of the Criminal Code pursuant to Section 41 (1) of the Constitutional Court Act, as contained in the operative part.

[79] The Constitutional Court notes that Act C of 2012 on the Criminal Code (hereinafter referred to as the "New Criminal Code") will enter into force on 1 July 2013, Section 335 of which, similarly to the current Criminal Code, also provides for the criminalisation of the use of symbols of despotism among the crimes against public peace. In this context, the Constitutional Court points out that Section 335 of the New Criminal Code and Section 269/B of the Criminal Code formulates the statutorily protected legal interest, the symbols in question, the *actus rei* amongst the statutory provision elements of the use of symbols of despotism in the same way. There is a difference with regard to the legal consequence of criminal law, the current regulation orders the use of symbols of despotism to be punished by a fine whereas the New Criminal Code orders such crime to be punished by short-term incarceration. As the elements of the statutory provision are essentially the same, the Constitutional Court finds in this regard that the constitutional concerns raised in connection with Article 269/B of the Criminal Code also apply to the statutory provision set forth in the New Criminal Code already promulgated but not yet in force.

[80] The publication of the Decision of the Constitutional Court in the Hungarian Gazette is based on Section 44 (1) of the Constitutional Court Act.

Budapest, 19 February 2013

Dr. Péter Paczolay sgd.,
Chief Justice of the Constitutional Court

Dr. Elemér Balogh sgd.,
Justice

Dr. Mihály Bihari sgd.,
Justice

Dr. Egon Dienes-Oehm sgd.,
Justice

Dr. László Kiss sgd.,
Justice

Dr. Barnabás Lenkovics sgd.,
Justice

Dr. Béla Pokol sgd.,
Justice

Dr. Péter Szalay sgd.,
Justice

Dr. István Balsai sgd.,
Justice

Dr. András Bragyova sgd.,
Justice

Dr. András Holló sgd.,
Justice

Dr. Péter Kovács sgd.,
Justice

Dr. Miklós Lévay sgd.,

Justice delivering the opinion of the Court

Dr. István Stumpf sgd.,

Justice

Dr. Mária Szívós sgd.,
Justice

Concurring reasoning by *dr. András Bragyova*:

[81] I agree with the decision that Section 269/B of the Criminal Code is contrary to the Fundamental Law. However, my reasons differ from those formulated in the Reasoning of the Decision.

[82] In line with the Decision, legal certainty [Article B of the Fundamental Law] is violated by the wording of Section 269/B of the Criminal Code. In my opinion, the reviewed statutory provision is also unconstitutional (contrary to the Fundamental Law), but for other reasons. My opinion differs from that of the majority in that it is based on an assessment of the restriction of fundamental rights contained in the statutory provision and concludes from this that the statutory provision is unconstitutional (contrary to the Fundamental Law).

[83] Section 269/B of the Criminal Code restricts freedom of expression. Freedom of expression is restricted by any rule of law which prohibits or makes compulsory conduct which is classified as free, that is to say, permissible, in a right of liberty. The statement of the Constitutional Court, cited many times (and often criticised), in Decision 30/1992 (V. 26.) AB, ABH 1992, 167, 179, pursuant to which the Constitution protects opinion regardless of its content, is to be correctly understood that the scope of protection of the fundamental right statutory provision extends to all opinions (orally, in writing, in image or otherwise expressed publicly), followed by an assessment of the constitutionality of the restriction. Content subject to constitutional restriction is also subject to constitutional protection, because the restriction must comply with the constitutional conditions of the restriction of any fundamental right, including the inviolability of its essential content [Article I (3) of the Fundamental Law]. Protection without content restrictions only applies to essential content: Somewhere, at some point, in some way, regardless of its content, all opinion must be expressable, even if the place, mode, time, etc. can be limited. (For example, the dissemination of pornographic literature, press, film, etc. may be restricted, but not so much that it cannot be disseminated at all.)

[84] Under Section 269/B of the Criminal Code, the expression of the acceptance, approval or support of a certain political opinion or ideology by public use of certain symbols is prohibited or, more precisely, deemed prohibited in the statutory provision. In doing so, it limits political expression, which is historically the most important case

of freedom of opinion and also fundamental in modern democracy. Due to the great role of public opinion in modern democracy, the restriction of all public political opinions is the concurrent restriction of the basis for democracy, that is, the constitutional system. Conduct deemed despotic, or more I think, anti-democratic, in the statutory provision, express views contrary to the fundamental values of the constitutional system; and only those that are truly aimed at undermining the societal acceptance of democratic core values can be banned. This may justify a restriction on the public representation of certain opinions, even in a constitutional democracy committed to freedom of opinion and that of the press. One of the foundations of the survival of modern constitutional democracies is the adoption of the same basic values in public opinion, in the values of society, in addition to diversity (which John Rawls called the 'overlapping consensus'). Freedom of expression, in addition to being an individual right, also protects the public as an institution [Decision 30/1992 (V. 26.) AB, ABH 1992, 167, 178]. The basis of constitutional democracy is thus not coercion, but social consensus, the maintenance of which is also the protection of the constitutional order. The public dissemination of views that are extremely opposed to the social consensus without legal opposition may give the impression that such views are part of the constitutional consensus. This does not justify censorship, that is, preliminary assessment, but a reaction which, however, must remain symbolic, precisely on the basis of democratic values. Due to the above, the protected legal object of the crime included in Section 269/B of the Criminal Code is not public peace, but the democratic constitutional system; therefore, the statutory definition is considered a political crime.

[85] The measure of justification for a restriction is necessity and proportionality. The necessity can be further broken down into the constitutional reason for the restriction, here prohibition, and the suitability of the restriction if the reason for the restriction of a fundamental right is acceptable. As stated above, the use of at least some radically anti-democratic political symbols in front of a large public gathering may be prohibited; therefore, a ban (in some cases) can be accepted as necessary. I agree with the decision that the use of these symbols can only be illegal if certain opinions are expressed with them. This is important because by using the symbol, it is possible to express the rejection of the political opinion (ideology or creed) signalled with the symbol, depending on the circumstances.

[86] Even accepting the abstract necessity of the restriction, the prohibition of certain political symbols in its current form is not suitable for achieving its constitutionally justifiable objective of maintaining the social consensus necessary for the maintenance of constitutional democracy. It is not suitable because it only penalises the use of some of the symbols listed, not their meaning. The use of certain punishable symbols (e.g., the swastika) may mean identification with the Nazi idea; but the same meaning may be expressed by other symbols which are not prohibited by the statutory provision.

Section 269/B of the Criminal Code prohibits the use of the swastika, but not the dissemination of Hitler's portrait to the general public. It is therefore unsuitable for its purpose: All the symbols which support such views, even those introduced later, must be prohibited. The itemisation of prohibited symbols in the statutory provision does not appear to be suitable for achieving this objective.

[87] I would also note that, in my view, Section 269/B of the Criminal Code is, moreover, overly restrictive, since in some cases it does not only prohibit dissemination in front of a large public gathering. Freedom of expression is less threatened by the use of anti-democratic symbols in front of the smaller public gathering, so restricting the more restrictive use of symbols that can be banned in front of a large public gathering would already be a disproportionate restriction on fundamental rights.

Budapest, 19 February 2013

Dr. András Bragyova sgd.,
Justice

Concurring reasoning by *dr. Egon Dienes-Oehm*:

[88] I agree with the operative part of the Decision, but my opinion differs as regards certain elements of the Reasoning and their main emphasis.

[89] 1. First of all, I consider it essential to underscore that Section 269/B of the Criminal Code, introduced by Act XLV of 1993 amending Act IV of 1978 on the Penal Code, criminalised in full accordance with the then Constitution in effect at the time and in accordance with the actual social situation the dissemination, use in front of a large public gathering and public display of extremist symbols linked to dictatorships specifically mentioned in the statutory definition. To achieve the aim and intention set out in the Preamble to the Constitution to "to facilitate a peaceful political transition to a state under the rule of law, realising [...] a parliamentary democracy and a social market economy," in the specific situation in Hungary, it was necessary to restrict the freedom of expression in this way, without assessing the intent of the *actus reus*, in order to protect public peace (prevention of disorder) and the rights of others.

[90] The above was reflected in the Constitutional Court's Decision 14/2000 (V. 12.) AB (hereinafter referred to as the "2000 Court Decision"), which "also referred to the fact that in a given historical situation, it is the system of criminal law instruments that provides effective protection (as ultima ratio)." (See Point III/1 of the above Decision")

[91] In view of the above, if the 2000 Court Decision could have been classified as a 'matter judged' of the present situation, the Constitutional Court would have had to reject the petition.

[92] 2. However, since the Constitutional Court's 2000 Decision on Section 269/B of the Criminal Code, a number of new facts and circumstances have emerged, which, if not individually or separately, justify that the Bench, after reviewing all the facts and circumstances, reassess the changed situation on the basis of the principle of "*clausula rebus sic stantibus*" and, if necessary, reach a different conclusion. In my view, the following had to be taken into account in chronological order from the point of view discussed here.

[93] In 2008, the European Court of Justice (hereinafter referred to as the "Human Rights Court") delivered the judgement in Vajnai v. Hungary (Application no. 33629/06), on which the Reasoning for this Decision is based.

[94] In the context of the judgements of the Human Rights Court in a particular case, I would like to emphasize in general terms that they do not in themselves constitute a legislative obligation for the States Parties admonished in the proceedings. However, the circumstances of the judgment in this case and its subsequent consequences had the effect that, in the current situation, in the light of the changed circumstances, the justification for reviewing the statutory facts contained in Section 269/B of the Criminal Code could not be disputed.

[95] (a) The Hungarian Government did not lodge an appeal against the decision adopted in first instance in Strasbourg, which found a restriction of political expression concerning the criminal measure for wearing a red star and condemned Hungary in this particular case. This omission by the Government had two negative effects affecting the further application of Section 269/B of the Criminal Code.

[96] On the one hand, it questioned the attitude of the Hungarian National Assembly, but especially that of the government responsible for providing Hungarian representation in the Human Rights Court in 2008, regarding Hungary's domestic law. The Strasbourg interpretation of the law at first instance contained a number of controversial and contradictory findings which could have been used in an appeal for the further undisturbed sustainability of the statutory provision set out in Section 269/B of the Criminal Code.

[97] On the other hand, the judgement at first instance in Strasbourg, which became final as a result of the lack of an appeal, had an undesirable effect on both domestic compliance and enforcement. Using the above as their basis, the petitioner and his followers then sought their "vindication" before the Human Rights Court. At the same time, as a result of the Human Rights Court's position, the Hungarian judicial practice

revealed in this Decision also became increasingly contradictory, perceiving an overly broad definition of the statutory provision contained in Section 269/B of the Criminal Code, mainly the uncertainty of the intent of committing the offence.

[98] (b) I consider it important to take into account the changing circumstances that Poland, which has a similarly unfortunate historical fate and also suffered from previous dictatorships, criminalised the use of fascist, communist and other totalitarian symbols in 2009, following the example of Hungary. However, in 2011 the Polish Constitutional Court, in the light of the Human Rights Court ruling in Vajnai v. Hungary, declared the ban unconstitutional, establishing that it "violates the principle of *nullum crimen sine lege*" and, in this context, freedom of expression. " (Point IV/2 of this Decision)

[99] (c) The entry into force of the Basic Law of Hungary on 1 January 2012 is not only crucial in terms of the fact that the possible unconstitutionality of Section 269/B of the Criminal Code must be judged on the basis of the provisions of the Fundamental Law, the rules of the old Constitution and the Preamble determining the state objective at that time cannot be applied or formally taken into account. The Fundamental Law introduces several other changes with regard to the substantive assessment of the criminal statutory definition that are the subject of the proceedings in the light of the changed circumstances.

[100] First of all, it should be emphasised in itself that the Fundamental Law replaces the Constitution intended solely as provisional, which also means the end of the process of becoming a state governed by the rule of law.

[101] And the clause of the Preamble to the Fundamental Law, the National Avowal, that "we do not recognise the suspension of our historic constitution due to foreign occupations. We deny any statute of limitations for the inhuman crimes committed against the Hungarian nation and its citizens under the national socialist and the communist dictatorship" allows two conclusions relevant to the present case. On the one hand, the fact that the Basic Law seeks to declare at the constitutional level that inhuman crimes committed under the rule of national socialist and communist dictatorships do not become time-barred, which can be considered a moral satisfaction for the human dignity of the victims' descendants. On the other hand, and this may be relevant to the legal assessment of the present case, this declaration expresses at the constitutional level that it does not distinguish between the two dictatorships. As a result, should the Hungarian legislation intend to draw any legal consequences from the Human Rights Court's decision on the red star in the future, it cannot differentiate, concerning the elected legal solutions, between the legal assessment of the National Socialist and the communist symbols, and the persecution by criminal legal means.

[102] 3. The annulment of Section 269/B of the Criminal Code with effect "*pro futuro*", the constitutional legal assessment at the time of its adoption, compared to the changing circumstances, is, in my opinion, supported by the following compelling reasons:

[103] More than two decades after the end of dictatorships, in a consolidated state governed by the rule of law, it is doubtful that the mere use of any symbol should be criminalised, provided that it is not accompanied by the commission of an act threatening with other criminal consequences dangerous to society or that it is not intended to violate the dignity of others. (The latter condition is also confirmed by the proposal of individual deputies signed by more than two thirds of the Members of Parliament submitted on 8 February 2013 to the Fourth Amendment to the Draft Fundamental Law, which adds a new paragraph (4) to Article IX of the Fundamental Law providing as follows: "Freedom of expression may not be exercised with the aim of violating the human dignity of others.")

Budapest, 19 February 2013

Dr. Egon Dienes-Oehm sgd.,
Justice

concurring reasoning by *dr. László Kiss*:

I

[104] 1. In view of the reasons set out in the Decision, I agree with the finding that Section 269/B of the Criminal Code is in conflict with the Fundamental Law, and with the consequent *pro futuro* annulment.

[105] 2. However, I would have also considered it desirable if the majority's reasoning for the Decision had clearly set out the condition (such as the constitutional requirement in the Reasoning) in order to guide the application of the law, in particular, the practice of the ordinary courts, according to which otherwise factual conduct under the statutory provision requires criminal law intervention if the symbol is being used in connection and by identifying with the relevant despotic regime.

II

[106] 1. My point of departure consists in the premise that the *ex nunc* annulment of Section 269/B of the Criminal Code would make it impossible to deal effectively with acts that are incompatible with constitutional values and violate public peace, more precisely the constitutional order and the right to human dignity.

[107] By annulling Section 269/B of the Criminal Code *pro futuro*, the draft seeks to strike a balance between the protection of freedom of opinion and expression and the protection of public peace, in particular the constitutional order, and the right to human dignity. I consider this endeavour to be respectable. As a member of the Constitutional Court, I have always been and will continue to be a supporter of the right to freedom of expression. It has also happened that my position in this regard was stricter than that of the majority of the members of the Bench [see my dissent from Decision 57/2001 (XII. 25.) AB, ABH 2001, 484, 515.] However, in the light of the events of recent years, there has necessarily been a shift in emphasis in my position, and all this has gone so far as to state that the Constitutional Court cannot stop interpreting the right to free expression as explained in Decision 30/1992 (V. 26.) AB. I also emphasised all this in my dissenting opinion on Decision 95/2008 (VII. 3.) AB. (ABH 2008, 815.). In fact, I already agreed with Decision 14/2000 (V. 12.) AB (the content of the rejection of the petition contained therein), which assesses the constitutionality of the use of symbols of despotism, on a basis of principle similar to the present one.

[108] 2. The right to freedom of expression is a fundamental right, as it were, a "maternal right" to many other fundamental rights that can be deduced from it, more commonly known as "fundamental rights of communication". In line with the consistent case law of the Constitutional Court, in accordance with the necessity and proportionality test contained in Article I (3) of the Fundamental Law, the State may use the means of restricting a fundamental right only if justified by the protection or enforcement of another fundamental right or freedom, the protection of another constitutional objective or values. [For a summary of the above, see, for example Decision 65/2002 (XII. 3.) AB, ABH 2002, 357, 361–362.]

[109] In the present case, the restrictions on the right to free expression contained in Section 269/B of the Criminal Code may be necessitated by the right to human dignity, as well as the protection of public peace and, by extension, the protection of the constitutional order. Decision 14/2000 (V. 12.) AB, which I have already quoted, clearly states that "expressing opinions inconsistent with constitutional values is not protected by Article 61 of the Constitution." (ABH 2000, 83, 95.). On the other hand, deciding whether the factual conduct under the statutory provision included in Section 269/B of the Criminal Code infringes the right to human dignity and violates public order to such an extent that it already requires the protection of the constitutional order, as a rule only can be decided by a case-by-case assessment. Except in extreme cases, only those applying the law (primarily the judge) can take a position on whether or not

actions accompanied by fascist, Nazi signs or symbols reminiscent of them, such as the inauguration of the Hungarian Guard in the square in front of the President's Office with the participation of a female representative of an official invited to perform the inauguration, constitute any disturbance of public peace, which already endangers the existing constitutional order or causes a violation of the right to human dignity. Only on the basis of the combined interpretation of the relevant provisions of the Fundamental Law, the relevant international case law and Section 269/B of the Criminal Code will the judge be able to take a position on the issue whether a red star on a T-shirt will have the same effect as if a mass of demonstrators under a red flag wearing a red star chanted the Internationale Communist Anthem's verses. For me, therefore, the basic starting point is whether, in a particular case, a disturbance of public order constitutes (or may constitute) a violation of the existing constitutional order of values or the right to human dignity. The judge can consider competing fundamental rights and constitutional values only if a sanction similar to the criminal threat described in Section 269/B of the Criminal Code remains. I believe that the Constitutional Court in its majority reasoning for its current decision could have been of great help to ordinary courts by strongly emphasizing it as an almost constitutional requirement that a condition of criminal intervention is that the emblem be used in connection or in identification with the relevant system of despotic regime.

[110] 3. Due to the judgement of the Human Rights Court in the Vajnai case, is the Hungarian legislator obliged to repeal or the Constitutional Court to annul the text of Section 269/B of the Criminal Code exclusively concerning the red star? I must answer in the negative, since the application of the relevant case-law and the condition set out in point I. 2 of my concurring reasoning may create consistency between the Human Rights Court judgement and the content of Section 269/B of the Criminal Code, which must be re-evaluated by the legislator. Accepting the majority reasoning of the Decision, the judgement of the Human Rights Court is, in my view, also declaratory, that is, it does not constitute a direct obligation to exclude the contested norm from the legal system; nevertheless, it is a *conditio sine qua non* of the interpretation (definition of content and scope) of constitutional fundamental rights as enshrined in the Fundamental Law and the international convention, and the application of which helps to resolve the conflict between the domestic legal system and the Convention, by which a breach of the Convention can be avoided. In the Vajnai case, the problem was not in itself the provision of Section 269/B of the Criminal Code concerning the red star, but the fact that the method of regulation chosen in it allowed the courts applying the law to prosecute manifestations protected under the Convention. The Human Rights Court also stressed in its judgement of 24 July 2012 in Fáber v. Hungary that only a detailed examination can determine which statements relating to a specific meaning fall within the protection of Article 10 of the Convention. The majority reasoning for the Decision could have given clear guidance to that examination, taking

into account the historical circumstances and the place and time of the use of the symbols, if it had included the condition in point I.2 of this concurring reasoning set out practically as a constitutional requirement. In any event, I could not have accepted the method of annulment, which would also have eliminated without a trace the possibility of preventing the use contrary to the Fundamental Law of symbols of despotism (even) by criminal law means. Therefore, I only support *pro futuro* annulment, paving the way for future regulation.

[111] 4. Due to the *pro futuro* effect of annulment, it is the right and responsibility of the legislature to decide on the facts, even with a different structure from the one annulled, to order the sanctioning of the use of symbols of despotism. In addition to the provisions of the Fundamental Law and the requirements arising from international obligations, this can be guided by the foreign regulatory solutions contained in the majority reasoning for the Decision, as well as the application of those explained in point I.2 of my concurring reasoning. For me, it would be completely unacceptable for any conduct that violates the right to human dignity and the constitutional order to remain without criminal sanctions.

Budapest, 19 February 2013

Dr. László Kiss sgd.,
Justice

I hereby express my secondment of Point I of the above concurring reasoning.

Dr. András Holló sgd.,
Justice

Concurring reasoning by *dr. Béla Pokol*:

[112] I agree with the annulment in the operative part, but I cannot support certain parts of the Reasoning.

[113] In my view, the annulment should have been justified by the overly broad prohibition on the use of the symbols contained in Section 269/B of the Criminal Code and its disproportionately restrictive effect on freedom of expression. The constitutional reason under the Fundamental Law for annulment can only be that the annulled statutory provision does not include the connection with the intent of wearing prohibited symbols, which means the public announcement and promotion of the identification with the authoritarian idea represented by the given symbol. The public

wearing of prohibited symbols only achieves with this intent, in my opinion, the cessation of the constitutional protection under the Fundamental Law of the expression of opinion and the constitutionality of prescribing criminality. The constitutional authority, by supporting its will in its draft Fourth Amendment to the Fundamental Law that it wants to criminalise the public promotion of totalitarian ideas; however, this cannot be interpreted as meaning that the mere use of symbols alone, without intent, amounts to the cessation of constitutional protection. I can only accept annulment on that ground.

[114] Contrary to the main line of the Reasoning, I do not agree with some parts of the Reasoning.

[115] 1. The repetition of the statement set out in previous Constitutional Court decisions in point III/3. of the Reasoning must be disputed, in the present case, in relation to the European Convention on Human Rights and the practice of the Human Rights Court, which, with an extremely individualistic conception of society, is based on the fact that the standard once laid down for the level of protection of the fundamental rights of individuals may no longer be amended in respect of a fundamental right, nor can it be reduced for the sake of the existence of a social community. This can be represented from the position of an individualist world view as the highest achievement, but that does not change the fact that it rests on an extremely one-sided world view. An individual can only exist in a social community, and his fundamental rights can always prevail only to the extent of the existence and harmony of the community and the moral order that ensures it. The "never-to-be-reduced level of individual fundamental rights" as a principled theorem contrasts with this, and in the light of the Fundamental Law's tendency to place more emphasis on community objectives and functions than the previous Constitution, this former individualist theorem can no longer be maintained.

[116] Thus, the Fundamental Law created a new situation with regard to the restriction of certain fundamental rights, because, unlike the old Constitution, the provision of fundamental rights to individuals is generally based on individuals integrated into the community. This is stated in several declarations of the National Avowal of the Fundamental Law, which, pursuant to Article R (3), constitute the basis for the interpretation of the entire Fundamental Law: "We hold that individual freedom can only be complete in cooperation with others." It appears in an identical way in the following declarations: "We hold that the family and the nation constitute the principal framework of our coexistence […]". "We hold that the strength of a community and the honour of each person are based on labour and the achievement of the human mind." However, in the same way, the following thesis declares the survival of the national community as the objective of the entire Fundamental Law and this legal system resting upon it: "We promise to preserve our nation's intellectual and spiritual unity, torn apart

in the storms of the last century." Finally, the final declaration of the Avowal focuses on national cooperation based on the existence and national order of individual citizens in the national community: "We, the citizens of Hungary, are ready to found the order of our country upon the common endeavours of the nation." Taking into account the consequences of these declarations of the Avowal, Article O) of the part titled "Foundation" of the Fundamental Law makes the exercise of certain fundamental rights a general obligation to contribute to community tasks according to one's abilities and talents: "Everyone shall be responsible for him- or herself, and shall be obliged to contribute to the performance of State and community tasks according to his or her abilities and possibilities."

[117] The Fundamental Law thus provided a new basis for the content of the fundamental rights granted to individuals by providing this general framework. The individual can only exist living in the community, and therefore, in the exercise of his individual rights, in addition to his own fulfilment, the survival of his community and nation must be ensured at all times. The protection of individual fundamental rights can always be ensured in the light of the state of the social community, so their change may in some cases justify reduction, and the Constitutional Court may not oppose this by declaring a ban on reducing the level of protection of fundamental rights.

[118] 2. A reservation should be made against the argument in point V/3. Of the Reasoning which also supports annulment by the fact that different courts make conflicting decisions by assessing the social danger of acts falling within this scope, and since this violates legal certainty, it is also a ground for annulment. In this line of argument, it should be pointed out that decisions against several criminal statutory provisions have been made in various courts for years, citing the lack of a threat to society, and if this now becomes one of the grounds for annulment, the solution of the continuing differences within the judicial system will be undertaken by the Constitutional Court instead of the specialised criminal courts and above them the Curia. For example, while in the Agrobank case, which was widely publicised in the mid-1990s, the trial court acquitted the banker defendants for lack of threat to society, whereas the Supreme Court, on appeal, took the position in principle in this case that once the legislature by creating a statutory provision has ordered the perpetrators of the acts under it to be prosecuted, then the court can no longer subsequently re-evaluate the threat to society and acquit the accused. As long as an interpretation dilemma can be resolved at the level of criminal justice, it should not be unnecessarily—and unduly—raised to the level of the constitutional law. The Constitutional Court cannot take over the role of the Curia.

[119] 3. Lastly, I cannot accept the analyses of the points IV/2 and IV/4, which also state the openness of the legal regulation of the disputed criminal statutory provision and the resulting unconstitutionality by conflict with the Fundamental Law of the uncertainty of law application with reference to the previous practice of the Constitutional Court and the "constitutional criminal law" declared therein. For this purpose, there is Article XXVIII of the Fundamental Law by enshrining the principle of "*nullum crimen*" and adhering to the Fundamental Law, the principle of legal certainty arising from the requirements of a democratic state governed by the rule of law also comes into play. This follows from the established internal principles of criminal law, the principle of *nullum crimen sine lege* and the criminal law prohibition of analogy; however, the repetition by the provisions of the Fundamental Law has raised them to the level of the Fundamental Law. The Constitutional Court may only review certain provisions of the Criminal Code by limiting itself to the above.

[120] The Constitutional Court should not duplicate individual branches of law by constructing "simple branch of law versus constitutional branch of law" but should apply the relevant provisions of the Fundamental Law. By constructing the "constitutional branches of law" created by its own decisions, the Constitutional Court tends to push the provisions of the Fundamental Law into the background and replace them by itself, which is unacceptable.

Budapest, 19 February 2013

Dr. Béla Pokol sgd.,
Justice

Dissenting opinion by *Dr. Barnabás Lenkovics*:

[121] 1. In the context of the description of the antecedents, the decision very correctly cites Decision 14/2000 (V. 12.) AB (hereinafter referred to as the "2000 Court Decision"), which has already reviewed the constitutionality of Section 269/B of the Criminal Code and found that it does not restrict the essential content of freedom of opinion, and for conduct prohibited by the provision at issue, the restriction is both necessary and proportionate. A "matter judged" cannot be established simply because the Constitution has been replaced by the Fundamental Law. However, the decision does not address the difference between the two, the analysis of shifts in emphasis regarding the set of values under review, although if it did, the position expressed in the cited 2000 Court Decision should have been maintained (and the petition rejected) and supplemented by new, additional arguments from the Fundamental Law.

[122] Compared to the general objective of the protection of "public peace", the set of values of the Fundamental Law gave added weight to the protection of the "dignity of communities committed to the values of democracy", thus largely the constitutional objective of Section 269/B of the Criminal Code has become a protection of dignity.

[123] Argued on the basis of the protection of dignity, the question under consideration can be considered a matter judged. Returning to the relationship between public peace and freedom of opinion, returning to the set of values of the previous Constitution and the reasoning of the case law of the Constitutional Court before the 2000 Court Decision, this Decision comes to a sharply opposite conclusion to the 2000 Court Decision, by adopting, in essence, a single dissenting opinion to the 2000 Court Decision, and annul the statutory provision in question. However, a complete Damascene conversion with the 2000 Court Decision is not justified by new arguments derived from the Fundamental Law, apparently because such arguments cannot be deduced from the Fundamental Law.

[124] 2. The 2000 Court Decision unequivocally held: "[…] Hungary's historical experience and the danger to constitutional values that the appearance of activities based on the ideologies of the past dictatorships in public today may pose to Hungarian society, convincingly, objectively and reasonably justify the prohibition of such activities and the action taken by criminal law instruments; the restriction of freedom of expression appearing in Section 269/B (1) of the Criminal Code shall be considered as a response to an pressing social need in the light of the historical background" (ABH 2000, 83, 99.). "[…] no legal instrument other than a system of criminal law instruments and sanctions is provided for effective protection (as ultima ratio)" (ABH 2000, 83, 99.). "[…] the restriction specified in Section 269/B (1) of the Criminal Code 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 means applicable and, therefore, the restriction of the fundamental right defined in the given provision of the Criminal Code is in compliance with the requirement of proportionality" (ABH 2000, 83, 100–101.). As regards public peace, the 2000 Court Decision has specifically established necessity and proportionality in defence of "dignity of communities committed to the values of democracy".

[125] The concurring reasoning attached to the decision also stated that "Section 269/B of the Criminal Code restricts freedom of expression to the extent necessary and proportionate in order to protect the constitutional values detailed above, in order to prevent a real threat to freedom of expression." (ABH 2000, 83, 103.)

[126] 3. The Fundamental Law of Hungary states in the National Avowal: "We hold that human existence is based on human dignity." Just as "human existence" is understood to mean individual and social (smaller and larger, looser and more organised) forms of

community life, so is the dignity of individual people summed up as the dignity of communities and acquires a new legal quality. International and national legal norms banning racial hatred, segregation and racism also protect the dignity of communities. In this spirit, the National Avowal of the Fundamental Law also emphasizes that "we deny any statute of limitations for the inhuman crimes committed against the Hungarian nation and its citizens under the national socialist and the communist dictatorship."

[127] The non-obsolescence of the statute of limitations of "inhuman crimes" is of historical significance and points to the future through the present. Therefore, the UN Universal Declaration of Human Rights stresses that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world", and that "disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind"; therefore, it is paramount that "human rights should be protected by the rule of law." It is in this spirit that Political Declaration 1/1998 (XII. 16.) OGY on the occasion of the 50th anniversary of the adoption of the UN Universal Declaration of Human Rights states that "The Declaration is a timeless and timely document whose consistent and complete enforcement for present and future generations shall be an unavoidable moral and political duty."

[128] Following the same set of values and serving the purpose of avoiding re-occurrence, the Charter of Fundamental Rights of the European Union underscores in its preamble that: "Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law" followed by placing DIGNITY at the forefront of fundamental rights (TITLE I), declaring that "Human dignity is inviolable." It must be respected and protected" (Article 1). As for the enjoyment of such rights, the Charter states that such enjoyment "entails responsibilities and duties with regard to other persons, to the human community and to future generations.

[129] In accordance with the Charter of Fundamental Rights of the European Union, the Fundamental Law links freedom to the responsibilities that come with it before the list of fundamental rights. Article I (1), at the head of fundamental rights, states that "The inviolable and inalienable fundamental rights of MAN shall be respected. It shall be the primary obligation of the State to protect these rights." In addition, Article II states more emphatically than before, in line with the Charter of Fundamental Rights of the European Union, that "Human dignity shall be inviolable." It follows that the values and spirit of the Basic Law, and many of its provisions, follow closely the human rights instruments of the United Nations and the European Union, in particular the protection of human (individual and community) dignity, in such a way as to pay greater attention to our specific historical circumstances as well. All such legal

principles and fundamental values formulated in the normative form establish the background and framework of the interpretation of the provision at issue. It can be stated that the content of the provision at issue protects these core values while remaining within the designated framework.

[130] 4. The right to human dignity has also been interpreted and defended by the Constitutional Court in a number of decisions, in line with international and European interpretation and practice. The Court summed up the essence of human dignity holding that "there is a core of individual autonomy, self-determination, separated from everyone else's disposition, as a result of which, in keeping with the classical wording, man remains a subject and cannot become an instrument or object." [Decision 64/1991 (XII. 17.) AB, ABH 1991, 297, 308.]

[131] In line with all international and European human rights conventions, the most serious crimes against human dignity are arbitrary deprivation of life, torture, inhuman and degrading treatment, slavery and human trafficking. These crimes were committed against tens and hundreds of millions of people worldwide by fascist and communist total dictatorships, treating man as an object that may be annihilated.

[132] Throughout the history of the 20th century, Hungary has been part of the horrors of both the fascist and communist dictatorships, both as a cause and, in a much larger social proportion, as a victim. Due to our particular historical circumstances, our relationship to the symbols of these ages is also different from that of the citizens of strong Western democracies. In our prohibition of the use of symbols of despotism, human dignity can be interpreted in several contexts. Historically speaking, it includes the dignity of the Hungarian nation, the dignity of the social community in terms of the present, the dignity of each victim, the personal dignity of the surviving relatives, and the dignity of future generations. The combined and effective protection of all these rights is more important, more extensive, and more important than either individual dignity in the strict sense, or the abstract concept of man and the abstract dignity associated with it. The necessity and proportionality of the reviewed legal prohibition must also be constitutionally assessed in the context of this multi-layered protection of dignity.

[133] Even in this broad interpretation, human dignity is at the forefront of human rights and fundamental freedoms, at the top of its hierarchy, and cannot be violated or even restricted by reference to any freedom or exercise of a fundamental right. Thus, Section 269/B (1) of the Criminal Code must also be assessed constitutionally in relation to this human dignity (aimed at protecting it) and its constitutionality is unquestionable in this respect.

[134] 5. As far as freedom of opinion is concerned, as a fundamental human right and as a constitutional fundamental right, it is not an unlimited right. As we have seen, the

exercise of freedom of opinion also comes with responsibilities and obligations towards other individuals, the human community, and future generations. The 2000 Court Decision summarised this as "expressing opinions inconsistent with constitutional values" is not protected by the Constitution (2000 Court Decision, ABH 2000, 83, 95). The Civil Code and other laws protect the human personality from infringing opinions. It is clear from all this that freedom of opinion as a fundamental right "ab ovo" has important and highly valued elements of rights, but also the same elements of obligations. These are not external constraints, but internal, immanent elements of a given right with rich content.

[135] Section 269/B of the Criminal Code sets out only some of these elements of obligation. If it did not do so, the same could be established by the Constitutional Court itself, in defence of dignity, through an interpretation of the Constitution. From the point of view of a fundamental right, such an interpretation is not a "restriction" but a "determination of the constitutional scope" of a given fundamental right (in our case, freedom of opinion) (Order 538/G/2006 AB, ABH 2009, 2876, 2883–2884.). The law defines not only the elements of the obligation, but also the exceptions that are irrelevant from the point of view of the protection of dignity with sufficient accuracy. Consequently, any expression of opinion that violates the rules of the Criminal Code, as it more than violates the law, violates the dignity of communities, the human dignity of survivors, and the dignity of victims, "cannot receive the shield of constitutional protection of free speech" (Order 538/G/2006 AB, ABH 2009, 2876, 2890.)

Budapest, 19 February 2013

Dr. Barnabás Lenkovics sgd.,
Justice

I hereby second the above dissenting opinion.

Dr. István Balsai sgd., *Dr. Péter Szalay* sgd.,
Justice Justice

Dissenting opinion by *dr. Péter Paczolay*:

[136] I do not agree that the operative part of the decision annuls Section 269/B of the Criminal Code with effect *pro futuro*, effective as of 30 April 2013. The decision reaches this legal consequence on the basis of a reasoning that examines the fulfilment of the

rule of law requirements for the constitutionality of criminal law derived from Article B (1) of the Fundamental Law. On the other hand, the constitutionality of the impugned provision should have been assessed by the Constitutional Court first of all in the context of the freedom of expression recognized in Article IX (1) of the Fundamental Law. In my view, Section 269/B of the Criminal Code restricts freedom of opinion unconstitutionally, therefore it should have been annulled *ex nunc*.

[137] Article IX (1) of the Fundamental Law enshrines freedom of expression in the same way as Article 61 (1) of the previous Constitution, and no other rule of the Fundamental Law justifies the Constitutional Court interpreting freedom of speech and its limitation differently from its previous practice. The Constitutional Court laid down the basic criteria for the restriction of freedom of expression in Decision 30/1992 (V. 26.) AB (hereinafter referred to as the "1992 Court Decision"). The cornerstone of his interpretation was that freedom of speech is a fundamental right of everyone in the process of individual self-expression and in the discussion of public affairs, so there is no constitutional possibility to restrict it on the basis of the content of speech alone. Based on the extremity, roughness and offensive nature of the opinion, it is not possible to set an objective standard for any intervention, there can be only external restrictions on freedom of expression. With regard to these external limitations, the Constitutional Court has established a general test that "[t]he laws restricting freedom of expression are to be assigned a greater weight if they directly serve the realisation or protection of another fundamental subjective right, a lesser weight if they only protect such rights indirectly through the intermediary 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, 167,178.) On this basis, the 1992 Court Decision defined the standard for the criminality of hate speech that specifically affects unidentifiable victims, that is, members of a community, in incitement to hatred, when there is a risk of violating a large number of individual rights behind the disturbance of public peace. This standard was reaffirmed by Decision 12/1999 (V. 21.) AB. At the same time, the Constitutional Court had previously ruled on the constitutionality of the facts of the Criminal Code under investigation in Decision 14/2000 (V. 12.) AB (hereinafter referred to as the "2000 Court Decision") and did not consider the prohibition of the use of symbols of despotism unconstitutional. However, in its decision, the Constitutional Court deviated from the previously established standard and, in special circumstances, found the criminal restriction to be constitutional in this form of symbolic speech without the fact that the statutory definition contained any element of incitement to violence or threat to individual rights.

[138] On the one hand, this Decision correctly explains that the legally significant new circumstances and considerations that have arisen since the adoption of the 2000 Court Decision necessitate a re-assessment of the constitutionality, on the other hand, since

the assessment is not, in principle, carried out on the basis of freedom of expression, it does not take full account of such circumstances. In addition to the rulings of the European Court of Human Rights described in the Decision, the development of the Constitutional Court's own interpretative practice would have required a new consideration. Following the 2000 Court Decision, the Constitutional Court has repeatedly reaffirmed its position in the 1992 Court Decision, while clarifying the criteria for criminalising hate speech. Decision 18/2004 (V. 25.) AB stated that "[i]n the case of conduct known as the most dangerous conduct, the legislator may restrict freedom of expression by criminal law means, which, by reaching the level of "a rebellious outburst that ignites passions in a larger mass of people", endanger the fundamental rights of individuals, which are very high in the constitutional order of values, which may also lead to a disturbance of public peace (this danger being direct and obvious)". (ABH 2004, 303, 320.) Decision 95/2008 (VII. 3.) AB also emphasised that "[t]he restriction of freedom of expression cannot be justified by the content of the extreme position, only by its direct, foreseeable consequence". (ABH 2008, 782, 786.) In the light of these decisions, it can be stated that the statutory provision of the use of symbols of despotism contained in Section 269/B of the Criminal Code is not in line with the standard developed in the consistent practice of the Constitutional Court. The statutory provision does not require the existence of a foreseeable risk of violence or individual rights, but limits the expression of opinion on the basis of the extreme content of the message conveyed by the marked symbols, without taking further considerations into account. However, the measure of the criminality of hate speech, as mentioned above, would always require additional considerations to be taken into account. The fact that the Constitutional Court at the time assessed the given historical situation and recognised the possibility of criminal law intervention could also have helped to reconsider the position on the restriction of the freedom of expression contained in the 2000 Court Decision.

[139] A strong argument in favour of consistently maintaining the standard of criminality laid down in the 1992 Court Decision and reaffirmed in subsequent decisions, given the cases in which it constitutes a restriction of a fundamental right. Indeed, in a number of its decisions, the Constitutional Court has developed specific tests of restrictions, thus ensuring the possibility of taking action against the social spread and harmful effects of hate speech. In the context of the present case, it should first be pointed out that Decision 95/2008 (VII. 3.) AB recognised the constitutionality of the restriction even if the person expressing hate declares his extreme political conviction that persons belonging to the victim group are forced to listen through it in intimidation, and they cannot evade communication (the phenomenon known as the 'captive audience'). (ABH 2008, 782, 789.) In addition, several decisions of the Constitutional Court have found the possibility of state action to be constitutional in the event that opprobrious expressions that do not violate human dignity in connection

with a specific person are heard in media with special social impact and influence [Decision 1006/B/2001 AB and Decision 165/2011 (XII. 20.) AB]. But it can also be mentioned in this context that the Constitutional Court has ruled that it is constitutional to prohibit the operation of parties or associations that advertise or engage in (e.g. fascist) activities that are contrary to the Constitution and constitutional law (Decision 810/B/1992 AB). The 1992 Court Decision standard is therefore applicable only in the absence of circumstances not specifically assessed elsewhere in constitutional court practice. In this context, however, there is no longer a constitutional reason why the expression of opinion that does not threaten with violence or violation of individual rights is restricted by criminal law. Prohibiting such acts of speech serve neither to shape nor strengthen democratic public opinion: In a pluralistic society, there will always be extreme opinions that are unacceptable to the majority committed to constitutional values, but their prohibition may result in these views poisoning society without the public rejecting or embarrassing them. The approach to the formation of public opinion in the 1992 Court Decision is not utopian: Experience also confirms that whenever responsible public figures acted as one person against extremist speech, haters were marginalised and constitutional values were strengthened. And in cases where such concerted action is not forthcoming, criminal law is ill-suited to replace it effectively.

[140] On the basis of all the above, the Constitutional Court should have carried out another constitutional review of Section 269/B of the Criminal Code in the context of freedom of expression and should have annulled the criminal statutory provision *ex nunc*. In the case of an unconstitutional restriction of freedom of speech contrary to the Fundamental Law, there is no constitutional reason for the Constitutional Court to temporarily keep the reviewed provision in force. Even under the above requirements of freedom of opinion, the legislator has room for manoeuvre to re-regulate the ban on the use of symbols of despotism; for example, it has the potential to regulate illicit behaviour embedded in the aforementioned situation of a captive audience. On the one hand, however, this legislative margin of manoeuvre is significantly narrower than at present, and on the other hand, the possibility of re-regulation cannot in any event justify the *pro futuro* effect of annulment. The application of this legal consequence is justified if, in the view of the Constitutional Court, the integrity of the legal system suffers less damage with the maintenance of the unconstitutional provision in conflict with the Fundamental Law than without it. Thus, with the future effect of annulment, the Constitutional Court does not recognise the possibility of legislation, but draws attention to the need for legislation. Such an aspect cannot be raised among the acts of conduct prohibited by Section 269/B of the Criminal Code; therefore, a provision restricting freedom of expression unconstitutionally could not have been maintained.

Budapest, 19 February 2013

Dr. Péter Paczolay sgd.,
Justice

Dissenting opinion by *dr. Mária Szívós*:

[141] I do not agree with the operative part of the Decision adopted by the majority and the reasoning for it. In my opinion, Section 269/B of Act IV of 1978 on the Penal Code (hereinafter referred to as the "Criminal Code") reviewed by the Constitutional Court does not violate the provisions of the Fundamental Law.

[142] 1. In my view, there would have been no need for a substantive examination in the present case, since an assessment into the constitutionality of the criminal statutory facts challenged by the petitioner, on the basis of the constitutional considerations raised by the complainant, but also in the light of other provisions of the Constitution, has already been conducted by the Constitutional Court in its Decision 14/2000 (V. 12.) AB (hereinafter referred to as the "2000 Court Decision"); therefore, it is a matter already judged. The practice of the Constitutional Court is consistent in that the issue raised in a petition is considered to be a matter judged if the petition is submitted for the same reason or in connection with the same legal provision. The decision made in the case adjudicated on the merits is also binding on the Constitutional Court. (Order 1620/B/1991 AB, ABH 1991, 972, 973.) Pursuant to Section 31 (1) of the Act CLI of 2011 on the Constitutional Court, if the Constitutional Court has already ruled on the conformity of an applied legal regulation or a provision thereof with the Fundamental Law based on a constitutional complaint or judicial initiative, no constitutional complaint or judicial initiative aimed to declare a conflict with the Fundamental Law may be admitted regarding the same legal regulation or provision thereof and the same right guaranteed by the Fundamental Law, with reference to the same constitutional law context, unless the circumstances have changed fundamentally in the meantime.

[143] In the 2000 Court Decision, which is otherwise of paramount importance in the context of the fundamental right to freedom of expression, the Constitutional Court has answered all the constitutional questions raised by the petitioner introducing the initiative of the present case, thus, the substantive examination of the petition could be made only if, in the light of the text quoted of the Constitutional Court Act, the circumstances had fundamentally changed since the previous decision. In my opinion, contrary to the position of the majority, such a circumstance can only be considered as a thorough transformation of the legal environment and a radical change in the

historical and political situation in which the Constitutional Court found it necessary to make a decision in this direction. In the present case, however, there is, of course, no change in the legal environment, and the constitutional considerations which guided the Constitutional Court in its earlier decision are also valid in today's historical and political situation; moreover, given the symbolic significance of the issue at hand, that is, the protection of the dignity of the victims of totalitarian regimes in the 20th century and those committed to democracy, and the deepening of social commitment to democracy after the change of regime, these considerations will remain relevant for decades to come.

[144] in view of the majority opinion, the decision of the European Court of Human Rights (hereinafter referred to as the "Human Rights Court") in the case of Vajnai v. Hungary is a sufficient reason for the Constitutional Court to reconsider its position previously set out in the 2000 Court Decision. I do not agree with this view. As stated in the decision itself, the judgement of the Human Rights Court is merely declaratory and merely serves as a basis for the Constitutional Court to interpret international conventions (in this case the Convention on Human Rights). In my view, therefore, the Human Rights Court's assessment of a particular case in the light of the provisions of the Convention on Human Rights is not of such a nature as to justify a reconsideration of the Constitutional Court's leading decision on the permissibility and limits of a restriction on fundamental rights. The current status of the Strasbourg case law (which can be overridden at any time) is therefore not, in my view, a sufficient argument for the Constitutional Court to break the binding force of an earlier decision on the basis of the principle of *clausula rebus sic stantibus*.

[145] In view of the above, I consider that the petition should have been dismissed.

[146] 2. However, even if there were room for a substantive examination in the present case, the result would, in my view, be only dismissal.

[147] The decision, which reflects the majority position, correctly concludes in the context of the assessment, continuing, moreover, the exceptional practice thus laid down in the 2000 Court Decision concerning the restriction of freedom of expression, that the protection of the dignity of the victims of the historical events in question may be a sufficient ground for abusing freedom of expression, in addition to a criminal prohibition of conduct contrary to the constitutional order of values derived from the Fundamental Law. I agree that the memory of the victims of the National Socialist and communist dictatorships, the dignity of their relatives and those who remember them are violated when groups professing and promoting extremist ideology, by abusing the fundamental right to freedom of expression, use symbols reminiscent of the tragic events of the 20th century. The decision also correctly applies the principles of constitutional criminal law, which were previously developed by the Constitutional

Court and, of course, in the context of the statutory definition reviewed in the present case. In my view, it unjustifiably concludes that the impugned statutory provision, due to its vagueness and overly general nature, does not stand the test of the criteria of constitutional criminal law.

[148] The Constitutional Court has previously pointed out that "[t]he individual's constitutional human rights and freedoms are affected not only by the select provisions and specific punitive sections of the special part of criminal law, but also by the interconnected and closed system of regulation of criminal liability, culpability and sentencing rules" [Decision 11/1992 (III. 5.) AB, ABH 1992, 77, 86.]. It cannot be disputed, therefore, in my opinion, that in examining the constitutionality of a criminal lawful fact, not only certain factual elements of the given statutory provision, but the whole system of criminal law rules, dogmatic theorems elaborated by science, findings of principle significance, otherwise (as the Decision itself rightly states) the specific practice of law application must also be taken into account.

[149] In line with the majority opinion, Section 269/B of the Criminal Code defines the scope of prohibited conduct too broadly, thus leaving room for arbitrary interpretation of the law of the law enforcer, "it does not differentiate, but the use of symbols is generally punishable, although consideration of the intent, mode of commission, or result produced would be essential." I fully agree with the view discernible from the Decision that the criminal offence in question, although the intent or motive is not included in the statutory provision, can only be realized if in the intention of the perpetrator, who engages in conduct that exhausts the elements of the statutory provision, and a form of identification with the Nazi or communist ideology, which is despised by the majority society and is incompatible with the values of the Fundamental Law, can also be grasped. However, in order for this requirement, which I have also accepted, to be met, it is not necessary to repeal the legal provision.

[150] There is an instrument in the complex system of criminal law by which it is possible to "filter out" of the conduct which would otherwise exhaust the elements of the statutory provision in question, the criminalisation of which is not justified, subject to the above requirement, which also follows from the justification related to the Criminal Code. The correct application of the concept of crime in the general part of the Criminal Code (Section 10 of the Criminal Code) may provide an appropriate solution to the "problem" best exemplified by the Vajnai case. The existence of a threat to society shall be assessed by those applying the law in all cases, even if the act in question otherwise exhausts all the elements of the statutory definition of a crime included in the Special Part of the Criminal Code. It is therefore necessary to assess in that context whether the act in question, in addition to constituting a particular statutory definition of a crime included in the Special Part, infringes or endangers the person or rights of citizens to such an extent that it requires the action of the criminal

authorities. If the answer is in the negative, there is a ground for to exclude commission of any crime. (Thus, in the case where the perpetrator sets a symbol of dictatorship "for the sport of upsetting the general public", his conduct does not reach the degree of constituting a threat to society that would necessitate the imposition of a punishment, so criminal proceedings must be terminated in the absence of a crime.) The decision itself presents a specific case where the court applied this legal solution.

[151] In addition to the above, I dispute the majority position because, contrary to what is stated in the Decision, there is a correct legal practice related to Section 269/B of the Criminal Code (that is, the perpetrator also requires a kind of identification as a state of mind), therefore, it is completely unnecessary to annul the impugned statutory provision by invoking its absence.

[152] The Decision itself correctly states that it is easy to read from the justification related to the legal regulation what motives and phenomena the legislator sought to reduce when criminalising the given criminal conduct. A teleological interpretation of the legal provision by those applying the law can therefore only lead to the result that the perpetrator's intention is characterized by an identification related to the particular ideology.

[153] This interpretation is also reflected in the explanation of Section 269/B of the Grand Commentary on the Criminal Code, which expresses the relevant case law: "This crime can only be committed intentionally, which intention may be either direct or contingent. The perpetrator's intention must encompass identification with the given ideology, and there must be political motivation behind the realization of the criminal act. If the perpetrator was not motivated by raising public awareness by the dissemination of authoritarian ideology, then one of the conditions for committing the offense is absent: The perpetrator, in displaying the symbol of despotism publicly, is guided by the fact that the forbidden symbol and the system of ideas represented by it should spread as widely as possible regarding public perception. The prohibition applies to the listed symbols as political symbols, and their display and use without such meaning shall not be subject to this provision."

[154] On the basis of all this, it can be concluded, in my opinion, that the judicial practice has already come to the recognition of what exactly is absent from the decision and which causes the legislation to be unnecessarily annulled. In particular, I consider it necessary to highlight that this is the correct interpretation of the law, which is also shared by the Grand Commentary on the Criminal Code, which reflects judicial practice, can be traced back to the 2000 Court Decision. The 2000 Court Decision held that: "The Constitutional Court made an assessment of the challenged provision in terms of the scope of prohibited *actus reus* concerning the use of symbols. The criminal acts of committing the offence as enumerated in Section 269/B of the Criminal Code reflect a

specific relation to the ideas represented by the symbols and connected to the forcible acquisition or dictatorial exercise of public power; the essential content is characterised by identification with, and the intention to propagate, the Nazi and Bolshevik ideologies that justified genocide and the forcible acquisition and exercise of public power. A symbol is the designation of an idea, person, or event by means of insignia or image, the purpose of which is to enable the sign and the marked ideas, persons, or events to be related to each other by their common features. For this reason, there is always some form of conscious, emotional connection to the appearance and perception of symbols" [ABH 2000, 83, 96.].

[155] In my view, therefore, there is a correct and interpretation of the law to be followed (lacking in the majority position) relating to the impugned criminal statutory definition. The fact that in the case law presented by the Decision there is a decision that is contrary to the interpretation of the law presented above (clearly appearing both in the Grand Commentary and in Decision 14/2000 (V. 12.) AB of the Constitutional Court, with *erga omnes* effect, meaning that it is also binding on the courts), does not in any way justify the annulment of the criminal statutory provision at issue. The creation and preservation of the unity of legal practice is the task of the Curia, which it fulfils primarily through legal uniformity decisions. The Constitutional Court has no jurisdiction to "take over" this task.

[156] In view of the above, in my view, as a result of the substantive examination, the petition could only be rejected. In the Reasoning, however, I would have found it acceptable to draw the attention of those implementing the law to the interpretation of the law to be followed in the 2000 Court Decision as well as in the Grand Commentary. The annulment of the legislation is therefore, in my view, unnecessary, and the fact that the date of *pro futuro* annulment is too close entails the risk that, if the legislator is not able to carry out the necessary codification work in the very short time available, Hungary will be overwhelmed by neo-Nazi young people from abroad who will "celebrate" and demonstrate under the auspices of National Socialist symbols, as current Hungarian criminal law no longer prohibits this.

Budapest, 19 February 2013

Dr. Mária Szívós sgd.,
Justice