

IN THE NAME OF THE REPUBLIC OF HUNGARY

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

decision:

The Constitutional Court declares that the text “or commits another act suitable for the arousal of hatred” in Section 269 item b) of Act IV of 1978 on the Criminal Code (hereinafter: the CC) is unconstitutional and, therefore, annuls it as of the date of publication of this Decision.

Section 269 of the CC shall remain in force as follows:

“A person who, in front of a large public gathering, incites hatred against

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

The Constitutional Court orders that the final judgments rendered in criminal proceedings conducted on the basis of the annulled text of Section 269 of the CC be reviewed if the convicted person has not yet been relieved of the unfavourable consequences of his conviction.

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

Reasoning

I

1. On the one hand, Section 5 of Act XVII of 1996 on the amendment of Act IV of 1978 on

the Criminal Code (hereinafter: CC Nov.) specified the details of the scope of victims of incitement against the community as defined in Section 269 of the CC and, on the other hand, it extended the scope of conducts punishable under the Section concerned.

Section 269 of the CC put into force on 15 June 1996 contains the following provisions:

“A person who, in front of a large public gathering, incites hatred against

a) the Hungarian nation,

b) any national, ethnic, racial or religious group, further against certain groups among the population, or commits another act suitable for the arousal of hatred commits a felony and is to be punished by imprisonment for a period of up to three years.”

2. Two petitions were submitted for the constitutional review of the normative text ordering the punishment of other acts suitable for the arousal of hatred as a new conduct constituting the offence introduced by Section 5 of CC Nov. The Constitutional Court consolidated the petitions and judged them in a single procedure.

According to one of the petitioners, the challenged text of Section 269 item b) of the CC violates the possibility to exercise the rights specified in Article 61 para. (1) of the Constitution. In the petitioner’s opinion, introducing a new term in addition to the concept of “inciting hatred”, which, by now, has been more or less clarified would result in making it impossible to define the conduct constituting the offence. As the petitioner stated, “fundamental rights may only be restricted by an Act of Parliament and never by judicial practice”.

The other petition proposed the retroactive annulment of the text “or commits another act suitable for the arousal of hatred” in Section 269 item b) of the CC. In the petitioner’s opinion, the provisions challenged violate Article 2 para. (1), Article 8 paras (1) and (2), and Article 61 para. (1) of the Constitution. According to the petitioner, the challenged text of Section 269 item b) of the CC results in a high level of legal uncertainty and opens up the way for a practice of applying the law in a manner suitable for the induction of fear.

## II

The petitions are justified for the following reasons:

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

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

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

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

Article 61 para. (1) In the Republic of Hungary everyone has the right to freely express his opinion, and furthermore to access and distribute information of public interest.”

2. Section 5 of CC Nov. does not contain any specific reasoning on extending the scope of conducts to be punished with reference to incitement against the community. According to the general reasoning of the draft of the statute, CC Nov. amends and supplements the CC to secure an effective combat against criminal offences committed on the basis of someone belonging to a national, ethnic, racial or religious group, and to harmonise it with the related international conventions.

Therefore, the Constitutional Court examined also in the light of the need to take a common European stand against the phenomena of racism and xenophobia the constitutionality of the legislature’s decision to restrict the freedom of expression by introducing a criminal offence constituted by committing other acts suitable for arousing hatred against the Hungarian nation, any national, ethnical, racial or religious group, further against certain groups among the population.

3. The Constitutional Court examined the constitutionality of the original Section 269 of the CC in its Decision 30/1992 (V. 26.) AB (hereinafter: the Decision of the Constitutional Court). Section 269 of the CC as effective at that time contained the following provisions:

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

a) against the Hungarian nation or any other nationality,

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

(2) Anyone who in front of a large public gathering uses an offensive or denigrating

expression against the Hungarian nation, any other nationality, people, religion or race, or commits other similar acts, is to be punished for the misdemeanour by imprisonment for up to one year, corrective training or a fine.”

In the Decision of the Constitutional Court, the Court acknowledged the constitutionality of Section 269 para. (1) of the CC as far as the restriction of the freedom of expression was concerned, but its paragraph (2) was declared unconstitutional and annulled. (ABH 1992, 167)

3.1. The Decision of the Constitutional Court was founded on the test of necessity in which it examined whether it was unavoidably necessary to restrict the freedom of expression and the freedom of the press in the case of conducts falling under the statutory definition, and whether the restriction complied with the requirement of proportionality, namely, whether the set of tools of criminal law were necessary and adequate for the aim to be achieved both in general terms and in respect of the statutory definition concerned. (ABH 1992, 172)

3.2. The Constitutional Court examined in the light of the requirements of constitutional criminal law the conduct specified in the statutory definition of incitement to hatred. It pointed out that the words themselves convey generally understood meanings. Given that even in the first Hungarian Criminal Code promulgated in Act V of 1878 (Codex Csemegi), incitement to hatred was the conduct constituting the commission of offence, the criminal courts could draw on more than a century's interpretative experience. The Curia [the Supreme Court] defined the concept of incitement with great precision on a number of occasions already at the turn of the century. According to the law, the term “incitement” is not the expression of some unfavourable and offensive opinion, but virulent outbursts which are capable of whipping up intense emotions in the majority of people which, upon giving rise to hatred, may result in disturbing the social order and peace (Curia, 7 Crim. Law Reports 272). This way, criticism, disapproval, objections or even offensive declarations do not constitute incitement; incitement occurs only when the expressions, comments etc. do not address reason but they seek to influence the world of emotions and are capable of arousing passion and hostile feelings. For the concept of incitement it is totally irrelevant whether or not the facts stated are true; what matters is that the specific composition of data, no matter if true or false, is capable of arousing hatred. (Curia, 1 Crim. Law Reports 124)

In the opinion of the Constitutional Court, the declaration of incitement to hatred as being a punishable criminal offence therefore complies with the requirements of necessity and proportionality as it extends to the most dangerous conducts only and may be unambiguously

applied by the courts. (ABH 1992, 177, 178)

3.3. In its Decision quoted before, the Constitutional Court established the unconstitutionality of, and annulled the criminal offence of “mudslinging” specified in Section 269 para. (2) of the CC. In the opinion of the Constitutional Court, for the maintenance of public peace the application of criminal sanctions for the public utterance, or a similar conduct, offending, disparaging or denigrating the Hungarian nation, other nationalities, peoples, religion or race is not unavoidably necessary. This statutory definition unnecessarily and, in light of the desired objective, disproportionately restricts the right to the freedom of expression. (ABH 1992, 167, 180)

3.4. Finally, as held in the Decision of the Constitutional Court, the dignity of communities may be a constitutional limit to the freedom of expression. Thus, the Decision does not preempt the legislature's ability to extend the scope of criminal sanctions beyond incitement to hatred. Nonetheless, there are other means available, such as expanding the possible use of moral damages, to provide effective protection for the dignity of communities. (ABH 1992, 181)

It was also held in the Decision of the Constitutional Court that “To afford constitutional protection to the incitement of hatred against certain groups under the guise of the freedom of expression and freedom of the press would present an indissoluble contradiction with the value system and political orientation expressed in the Constitution: the democratic rule of law, the equality of human beings, the equality of dignity, as well as the prohibition of discrimination, the freedom of religion and conscience, the protection of national and ethnic minorities – as recognised by the various Articles of the Constitution.” (ABH 1992, 173)

Consequently, the Constitutional Court established the constitutionality of statutorily restricting the freedom of expression and of the press by Section 269 para. (1) of the CC, as “...restricting the freedom of expression and the freedom of the press is necessitated and justified by both the historically proven harmful effects of raising hatred against a particular group of people and the need to protect the fundamental constitutional values as well as the obligation of the Republic of Hungary to perform its international commitments.”

At the same time, it was the subject of an independent constitutional review whether the statutory restriction can be considered a constitutional restriction complying with the substantial requirements following from constitutional criminal law.

In the Constitutional Court's view, “the impacts and the requirements concerning the

individual and the society of the previously analysed conduct prohibited by Section 269 para. (1) of the CC are so grave that other forms of responsibility, such as the application of the instruments of civil law liability, are inadequate for dealing with the perpetrators of such conduct. The emphatic expression of disapproval and condemnation of such conduct, the fortification of the democratic ideas and values which are attacked by the perpetrators of such acts and the restoration of the violated legal and moral order require the application of the instruments of criminal law. The conduct constituting the offence in the definition of “incitement to hatred” was also interpreted by the Constitutional Court. It held that the more serious form of incitement against the community, i.e. the statutory definition of incitement to hatred, therefore complies with the requirement of proportionality as it extends to the most dangerous conducts only and may be unambiguously applied by the courts. (ABH 1992, 176, 178)

### III

1. Section 269 of the CC as amended by Section 5 of CC Nov. extended the scope of conducts punishable with reference to incitement against the community. In addition to incitement to hatred, this provision of the CC orders the punishment of other acts suitable for the arousal of hatred as well.

In addition to incitement to hatred, ordering the punishment of other acts suitable for the arousal of hatred as new forms of conduct constituting the offence reflect the legislature’s intention to punish specific conducts beyond the scope of incitement to hatred as established in the practice of the courts and examined theoretically in the Decision of the Constitutional Court.

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

In addition, the expansion of criminal law liability was implemented by introducing an element into the statutory definition that does not comply with the requirements of legal certainty and constitutional criminal law demanding definiteness, clarity and the prevention of arbitrary application of the law.

It was already held in Decision 36/1994 (VI. 24.) AB of the Constitutional Court that although the freedom of expression enjoys a special status, it is not unrestricted. By all means, the right to free expression must give way to a few rights only; that is, the laws restricting this freedom must be strictly construed. The right to free expression protects opinion irrespective of the value or veracity of its content. The freedom of expression has only external boundaries: until and unless it clashes with such a constitutionally drawn external boundary, the fact of expression of opinion is protected, irrespective of its content. (ABH. 1994, 219, 223)

As held by the Constitutional Court in its Decision 11/1992 (III. 5.) AB, “legal certainty requires from the State, and primarily from the legislature, that the law as a whole as well as its specific parts and provisions including the CC be clear, unambiguous, their impact predictable and their consequences foreseeable by those to whom the laws are addressed... legal certainty demands a clear and unambiguous formulation of statutes to make all persons affected aware of the legal situation so as to allow to adjust one’s decisions and conducts to the situation as well as to count on the legal consequences thereof. It should be possible, on the basis of the above, to calculate the conducts of other legal subjects and the State’s authorities acting according to the statute.” (ABH 1992, 84, 91).

2. The Constitutional Court had to examine in the present case whether supplementing the statutory definition of incitement to hatred specified in Section 269 para. (1) of the CC and thus making punishable “other acts suitable for the arousal of hatred” complied with the requirements of the rule of law concerning constitutional criminal law as elaborated by the Constitutional Court.

The Constitutional Court pronounced in its Decision 21/1996 (V. 17.) AB that although the definition of criminal offences is the competency of the legislature and thus the sphere where democratic majority opinion is realised, in exceptional cases constitutional review can be applied here, too. (ABH 1996, 82)

It is the established practice of the Constitutional Court to take a position on the merits

concerning the constitutionality of declaring a specific conduct a criminal offence if its punishment results in the restriction of any fundamental right. Accordingly, the Constitutional Court examined incitement against the community (Decision of the Constitutional Court), defamation of authorities or official persons [Decision 36/1994 (VI. 24.) AB; ABH 1994, 219], and press administration offence (Decision 2269/B/1991 AB; ABH 1996, 380) as restricting the freedom of expression; furthermore, offences against the duty in national defence [Decision 46/1994 (X. 21.) AB; ABH 1994, 260] as restricting the freedom of conscience and religion. Having regard to the forms of ownership, the Constitutional Court examined the constitutionality of making a difference at the level of criminal law protection concerning the original statutory definition of negligent management. [Decision 6/1992 (I. 30.) AB; ABH 1992, 40]

With respect to the fact that, according to the Constitutional Court, the constitutional requirement of (necessary and proportionate) restriction can be related not only to fundamental rights but to “other constitutional values” as well, the Constitutional Court established the unconstitutionality of ordering the punishment of abusing the right of association based on violating Article 2 para. (1) of the Constitution. [Decision 58/1997 (XI. 5.) AB; ABH 1997, 348]

The Decision of the Constitutional Court defined the criteria of constitutional control, too. It pointed out that “criminal law is the ultima ratio in the system of legal responsibility. Its social function is to serve as the sanctioning cornerstone of the overall legal system. The role and function of criminal sanctions, i.e. punishment, is the preservation of legal and moral norms when no other legal sanction can be of assistance.

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

The Constitutional Court also stressed the importance of examining when constitutionality of a criminal statute is assessed whether the specific provision of the CC “is restrained and provides an appropriate response to the phenomenon deemed undesired and dangerous, that

is, whether, in accordance with the authoritative requirement in restricting a constitutional fundamental right, it confines itself to the narrowest possible scope to achieve its objective. Constitutional criminal law requires the disposition describing the prohibited conduct by threatening with a sanction in criminal law to be straightforward, well defined and clear. It is a constitutional requirement to clearly express the intentions of the legislature concerning the protected legal subject and the conduct constituting the offence. It must contain a definite message on when the individual is considered to commit a breach of the law sanctioned in criminal law. At the same time, it must not give way to arbitrary interpretation of the law by the jurisdiction. Therefore, it must be examined whether or not the statutory definition delimits the scope of punishable conducts too broadly and whether it is definitive enough.” (ABH 1992, 176)

Based on the above, the review resulted in the Constitutional Court establishing that with the challenged supplementation of statutory definition the legislature went too far in expanding the scope of punishable conducts, the statutory definition of incitement to hatred as interpreted in the Decision of the Constitutional Court, and the constitutional limits of culpability. In the Decision of the Constitutional Court, the constitutional limit of culpability was incitement to hatred rather than the “arousal of hatred” in general. Punishing other acts suitable for the arousal of hatred would be unconstitutional not only because of diminishing the threshold of culpability, but on the basis of its indefiniteness as well.

3. The term “committing other acts” as an element of the statutory definition of the offence does not comply with the above requirements due to its indefinite nature. (ABH 1992, 176) As a result, the Constitutional Court holds that the indefinite nature of the supplement to the statutory definition, implying the possibility of arbitrarily restricting the right to the freedom of expression as well, is unconstitutional under Article 2 para. (1) of the Constitution.

Consequently, the Constitutional Court holds that the text “or commits another act suitable for the arousal of hatred” in Section 269 item b) of the CC unnecessarily and disproportionately restricts the right to the freedom of expression provided for in Article 61 para. (1) of the Constitution and, at the same time, violates the requirements of constitutional criminal law deducted from Article 2 para. (1) and Article 8 paras (1) and (2) of the Constitution. For this reason, the Constitutional Court nullifies the challenged text in Section 269 item b) of the CC.

The review of criminal proceedings in which final judgments have been entered pursuant to

the nullified normative text of Section 269 of the CC is ordered pursuant to Section 43 para. (3) of Act XXXII of 1989 on the Constitutional Court; publishing the Decision in the Hungarian Official Gazette is ordered pursuant to Section 41 of the same Act.

Budapest, 19 May 1999

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