

IN THE NAME OF THE REPUBLIC OF HUNGARY

In the matter of petitions seeking a posterior review of the unconstitutionality of a statute, the Constitutional Court – with concurring reasoning by dr. Árpád Erdei, dr. Attila Harmathy, dr. István Kukorelli and dr. János Németh, Judges of the Constitutional Court– has adopted the following

decision:

The Constitutional Court rejects the petitions seeking the establishment of the unconstitutionality and the annulment of Section 269/A of Act IV of 1978 on the Criminal Code.

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

Reasoning

I

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

In the petitioners' opinion, Section 269/A of the CC violates the freedom of expression specified as a fundamental right in Article 61 para. (1) of the Constitution, and therefore, they asked for establishing the unconstitutionality and the annulment of the challenged statutory provision. According to one of the petitioners, the value injured by the provisions in question of the CC is too great, and the legal means are inappropriate to secure the honouring of national symbols. The other petitioner held that the defamation of national symbols is a way of expressing one's opinion in a peculiar aspect which is still unusual in Hungary. The same petition alleged the discriminative nature of Section 269/A of the CC as it only protects the state symbols covered by the sovereignty of the Hungarian State.

II

1. Article 61 para. (1) of the Constitution defines the freedom of expression as a fundamental right: “In the Republic of Hungary, everyone has the right to freely express his opinion and, furthermore, to have access to and distribute information of public interest.”

Chapter XIV of the Constitution provides for the Capital and the National Symbols of the Republic of Hungary. Articles 75-76 contain the following provisions on the national symbols:

“Article 75. The national anthem of the Republic of Hungary is the poem "Himnusz" by Ferenc Kölcsey, set to the music of Ferenc Erkel.”

Article 76 (1) The National Flag of the Republic of Hungary is a tricolour consisting of horizontal red, white and green bands of even width.

(2) The coat of arms of the Republic of Hungary is a Per Pale shield pointed in base. Dexter field Barry of Eight gules and argent. Sinister field gules, centre base triple mount vert with a crown or and Lorraine cross argent on the central emerging mount. On chief the Holy Crown of St. Stephen.

(3) A majority of two-thirds of the votes by the Members of Parliament is required to pass the law on the coat of arms and national flag of the Republic of Hungary and the use thereof.”

2. Section 55 of Act XVII of 1993 on the amendment of penal statutes added the following provision to the CC under the title "Defamation of National Symbols”:

“269/A Anyone who in front of a large public gathering uses an offensive or denigrating expression against the national anthem, flag or coat of arms of the Republic of Hungary, or commits other similar acts, if no graver criminal offence is thus committed, is to be punished for misdemeanour by imprisonment for up to one year, public labour or a fine.”

3. According to Article 19 of the International Covenant on Civil and Political Rights adopted by the General Assembly of the United Nations on 16 December 1966 and promulgated in Hungary in Law-Decree 8 of 1976 (hereinafter: the Covenant):

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

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

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

- a) for respect of the rights or reputations of others;
- b) for the protection of national security or of public order (*ordre public*), or of public health or morals.”

4. Article 10 of the Convention on the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and promulgated in Hungary in Act XXXI of 1993 (hereinafter: the Convention) lays down the following:

“Article 10

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

III

The petitions are unfounded.

When examining the case, the Constitutional Court studied the relevant provisions of constitutional law and criminal law of certain European countries, the related international treaties as well as the practice of the European Court of Human Rights (hereinafter: the Court).

1. Firstly, the Constitutional Court examined in the comparative study how ensigns are constitutionally regulated in the practice of other European countries. Most of the European

constitutions regulate ensigns, and such rules are usually found at the beginning of the individual constitutions among the provisions on the principles regarding sovereignty. The constitutions of Western, Northern and Southern European countries mostly define the colours of the national flags, while some constitutions provide for the national anthem, the capital or the official language, and sometimes also the oath, watchwords or phrases are regulated as ensigns. The constitutions of Central Eastern European countries are focusing on the coat of arms and most of them feature the national flag, the national anthem and the capital; the official language and the seal of the State are also often mentioned. There are two ways of constitutionally regulating ensigns: some constitutions define the contents of ensigns, e.g. the elements of the coat of arms, while others empower the legislature to regulate ensigns. The constitutions generally specify the use and the protection of ensigns as the exclusive subject of the legislation, providing in some cases for qualified majority. Some constitutions even stipulate that ensigns are honoured and enjoy special legal protection.

2. According to the comparative study, the defamation of national (State) ensigns is sanctioned with criminal law punishment in several European countries; for example, the Austrian, German, Swiss, Italian, Spanish, Portuguese and Polish criminal codes contain such provisions.

The subject of the criminal offence concerned is regulated partly differently and partly similarly or identically in the criminal codes of the states listed above: criminal law protection covers the colours of the national flag, other national or State symbols, and ensigns, including in the case of federal states the symbols, flags or coats of arms of the member states, provinces, cantons etc.

The foreign laws mentioned above contain a wide scope of conducts constituting criminal offence: the criminal offences in question may be perpetrated by way of “malignant fulmination”, “fulmination”, “dishonouring”, “demolition”, “removal”, “impairment”, “making unrecognisable”, “abusive affray”, “blowing down”, “technical assault or injury”, “defacement”, “defilement” etc.

The German, Italian, Portuguese and Polish criminal codes protect the national ensigns of foreign states to the same degree as their own national symbols. The criminal codes of the states concerned rank this criminal offence among the offences against the State. The

sanctions applied in the criminal law of the states in question are similar to those used in the Hungarian CC.

According to the above, the criminal law protection of national (State) ensigns is not a peculiar Hungarian phenomenon.

3. In the issue concerned, the Constitutional Court used as a basis the Covenant, the Convention and the practice of the Court. The Covenant and the Convention define how human rights may be restricted, and the judicial practice has interpreted the relevant rules.

The requirement applied by the Court to the restriction of human rights is that it must be based on a statute of an appropriate level the content of which must be clear for the citizens to be aware of the consequences of their conduct.

In recent years, the Court has held it necessary that the freedom of expression be statutorily restricted in order to protect the religious convictions and the religious feelings of others against abusive conducts that raise indignation, and thus the Court evaluated such a restriction as restricting the freedom of thought, conscience and religion specified in Article 9 (1) of the Convention for the purpose of protecting “the rights of others” as mentioned in Article 10 (2) of the Convention (Otto-Preminger-Institut vs Austria judgement, 20 September 1994, Series A no. 295-A, p. 14, § 48; Wingrove vs United Kingdom judgement, 22 October 1996, no. 19/1995/525/611, § 48).

The above decisions of the Court acknowledged the statutory objective of protecting the rights of others by restricting the freedom of expression in respect of religious convictions and religious feelings. However, similar to religious convictions and feelings, the conviction or emotions related to belonging to a certain state are worth protecting against the use of expressions defaming or degrading the symbols of the independent state or against similar acts.

According to Article 10 (2) of the Convention, a further condition of restricting human rights is that protection on the above grounds is made necessary in a democratic society.

Both Article 19 (3) of the Covenant and Article 10 (2) of the Convention provide that exercising the right to the freedom of expression carries with it duties and responsibilities as well. Both judgements of the Court referred to above examine the offensive nature of the opinion in the context of the duties and responsibilities carried by the freedom of expression. Both judgements assess in the light of the particular features of the countries concerned whether such restriction is socially necessary and proportional in order to achieve the desired objective. The Court judged the social causes necessitating the restriction by taking into account the particular features of Hungarian history in the case *Rekvényi vs Hungary* (Court Reports 1999/12 p. 956).

4. It is held in many judgements of the Court that in the period of transition from a totalitarian state model into a democratic society, until the final consolidation of democratic institutions, certain rights may be restricted even in cases where it would be unjustified in a country with uninterrupted democratic development.

According to the comparative study, there are criminal law rules in many European countries restricting the freedom of expression concerning the ensigns of the State. Consequently, it is held necessary in these countries to prevent the expression of opinion offending the ensigns of the state in a democratic state and to sanction the conducts that may shock people who feel attached to the state concerned.

It is characteristic in general for the European constitutional democracies that the freedom of expression has been widened and, in a parallel process, the scope of the subjects protected by criminal law has been limited. In the democratic societies, such protected subjects include – not independently from national historical traditions – the national symbols due, among other factors, to their being regulated on a constitutional level. The parliaments have a wide scale of discretionary power on offering criminal law protection for the national symbols.

IV

1. The Constitutional Court has already presented its opinion on the constitutional conditions of restricting the freedom of expression by measures of criminal law in several of its decisions, and first of all, in Decision 30/1992 (V. 26.) AB (ABH 1992, 167), with a summary opinion offered in Decision 36/1994 (VI. 24.) AB (ABH 1994, 219).

The Constitutional Court explained in detail the constitutional conditions of restricting the freedom of expression in Decision 30/1992 (V. 26.) AB on the annulment of sanctioning the less severe form of incitement against the community (hereinafter: the CCDec.).

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

Criminal law is the *ultima ratio* in the system of legal liability and its social purpose is to become a keystone of sanctions in the legal system as a whole. 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.

The Constitutional Court pointed out that the right to the freedom of expression is not merely an individual fundamental right but also the recognition of the objective institutional aspect of that right concurrently means a guarantee for the free formation of public opinion. Although the privileged position of the right to the freedom of expression does not mean that this right may not be restricted, unlike the right to life or human dignity, which are absolutely protected, it necessarily implies that the right to free expression must give way to very few rights only; that is, the laws restricting this freedom must be strictly construed. The laws restricting the freedom of expression are to be assigned a greater weight if they directly serve the realisation or protection of another individual fundamental right, a lesser weight if they protect such rights only indirectly through the mediation of an institution, and the least weight if they merely serve some abstract value as an end in itself (public peace, for instance).

Finally, according to the CCDec., the dignity of communities may be a constitutional limit to the freedom of expression. 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, 171, 176, 178, 181.).

2. In the present case, the freedom of expression collides with another normative constitutional value directly deductible from the Constitution, and the structure of the concrete norm of criminal law is different (e.g. as far as the subject of the offence is concerned) as compared to the norms serving as the basis of former reviews performed by the Constitutional Court.

The normative provisions found in Articles 75 and 76 of the Constitution define the national symbols as constitutional values subject to constitutional protection. The constitutional provisions expressing the material existence and the twofold function of national symbols – serving as both the symbols of the nation and the ensigns of the Republic of Hungary as a State – underline the prominent role of such symbols in public law. This duality is pointed out in the reasoning of Act LXXXIII of 1995 on using the national symbols of the Republic of Hungary and the names referring to the Republic of Hungary (hereinafter: NSA): “According to the Constitution, our national symbols bear a twofold function defined by the Constitution. On the one hand, in Article 76 it gives an exact description of the symbols in relation to Hungarian statehood. On the other hand, by the definition contained in the title of Chapter XIV, it marks that these symbols are also the tools to express national feelings and belonging to the nation.”

Ensigns and symbols are as ancient as the history of mankind and human communities. Symbols, on the one hand, have always expressed the belonging of the individuals using the signs to a certain community, and, on the other hand, they have represented the whole community to the outer world. Although today mankind, as a whole, and large regions have symbols as well, the ensigns of national communities organised in the form of states have particular significance.

The concept of nation – as a community – has historical significance; it is relative in terms of time and territory. Nation has become closely linked to state power during the historical process of the formation of nation states. National symbols represent this historical process, and thus they have become the symbols of statehood. National symbols have the power of

safeguarding and maintaining the concept of sovereignty at times when independent statehood is lost or restricted.

This way, national symbols have a twofold meaning: on the one hand, they are external forms of representing statehood, the sovereignty of the state and, on the other hand, they are tools to express belonging to the nation as a community. These symbols can be and are widely used by the members of the community, both individuals and legal entities, to express their conviction of belonging to the Hungarian nation or the State of Hungary – or to both.

The possibility to express national feelings through the use of national ensigns is expressly acknowledged by the NSA, and – together with safeguarding the dignity of ensigns – it allows private individuals to use such symbols to express their belonging to the nation or, on a case-by-case basis, to use them on various national holidays or social events.

3. The ensigns regulated in the Constitution are closely related to the constitutional change of the regime in 1989-1990, i.e. to the creation of constitutional democracy. Act XXXI of 1989 enacted the National Anthem, Act XL of 1990 the National Flag, and Act XLIV of 1990 the coat of arms in the Constitution. According to the reasoning of Act XLIV of 1990 on amending the Constitution of the Republic of Hungary, “it is justified – taking into account the great significance and the emotional content of the State’s symbols – to regulate the coat of arms in a provision of the Constitution. The above constitutional regulatory subject of great importance together with the underlying historical consensus – as referred to in the reasoning of the Act as well – justify the constitutional demand for enhanced legal protection through which the constitution-making power wishes “to restore the order which is an integrated part of the historical processes of our sovereign statehood.”

The significance of the national symbols specified in the text of the Constitution has been reevaluated with regard to the history of Hungary in recent years, i.e. the transition from a totalitarian state model into a democratic society, and it is reinforced by the penal sanctions applied to certain conducts injuring these symbols. There are also historical circumstances justifying the legislature’s position reflected in Section 269/A of the CC.

In the present case, to be able to assess the historical features of the country one must be aware of the fact that from 1948 until the constitutional change of the regime the

independence of the state and the national symbols were closely related. The attachment to an independent Hungarian State and the national feelings were overshadowed by internationalism, the coat of arms was changed, there were regular arrests on national holidays, and the use of national symbols at these events was a politically suspicious act.

The constitutional importance of national symbols, as well as the enhanced and special protection of such constitutional values are justified and represented by the provision in Article 76 para. (3) of the Constitution specifying that the positive vote of two-thirds of the Members of Parliament is needed to adopt an Act of the Parliament on the coat of arms and the flag of the Republic of Hungary and the use thereof. Such qualified legislative majority is needed only for the adoption and the amendment of the Constitution. In 1995, the Parliament adopted the NSA for implementing Article 76 para. (3) of the Constitution.

It was in the protection of the freedom of expression that the CCDec. annulled Section 169 para. (2) of the CC that had ordered the punishment of expressing opinions defaming the Hungarian nation, other nationalities, peoples, religion or race. The Parliament was aware of the above decision when adopting Act XVII of 1993, Section 55 of which introduced the challenged Section 269/A to the CC on the defamation of national symbols. This penal provision no longer concerns the expression of one's opinion on the nation, other nationalities, peoples, religion or race but covers the symbols of the State that has just regained its independence.

4. The pluralism of opinions is not the only criterion of democracy. Democracies have institutions and symbols that represent the unity of the country, and they are, in a certain sense, out of the scope of the pluralism of opinions to be protected constitutionally – although they may be criticised.

This principle is also represented in respect of the President of the Republic, who represents the unity of the nation, whose person is inviolable and the criminal protection of whom is guaranteed in a separate Act of Parliament [Article 29 para. (1), Article 31/A para. (1) of the Constitution]. In Decision 48/1991 (IX. 26.) AB, the Constitutional Court applied a strict interpretation to the above provisions of the Constitution concerning the freedom of expression, although – taking into account the historical analogies – it did not exclude the enhanced criminal protection of the President of the Republic. In the Decision the

Constitutional Court pointed out the following: “The provision in Article 29 of the Constitution according to which the President of the Republic “represents the unity of the nation” refers, in the given context, much more to the impartiality of the function of the President of the Republic than to the presumption that an offence against the President would qualify similarly to the defamation of national symbols (flag, coat of arms or anthem). In providing special rules for the protection of honour, the legislature may consider either applying more severe sanctions or allowing broader possibilities to criticise the official activities of those who serve in public office or as civil servants.” (ABH 1991, 217, 238).

The national symbols listed in Chapter XIV of the Constitution – as such symbols may not be considered public actors even as constitutional institutions – are the constitutional symbols of the country’s external and internal integrity much more than the head of the State, whose office is restricted to the period of tenure and, therefore, the criminal protection of national symbols is constitutionally justified. The enhanced public law and criminal law protection of the institutions expressing and representing national sovereignty is constitutionally accepted in the European legal cultures and serves, at the same time, as a justified restriction of the freedom of expression.

5. In the legislation the offence of defaming national symbols is placed in Title II of Chapter XVI specifying the criminal offences against public order, among the offences against public peace, immediately after the offence of incitement against the community.

According to its place in the structure of the CC, the legal subject of the criminal offence in question is, therefore, public order in an indirect sense and public peace in a direct sense. The direct subject of committing the offence is the national anthem, the flag and the coat of arms of the Republic of Hungary.

The conduct of committing the criminal offence in question is similar to that of mudslinging as a specific form of incitement against the community annulled in the CCDec. The conduct of committing the offence is defined as follows: using, in front of a large public gathering, an offensive or denigrating expression in oral and active form, or committing other similar acts.

The significant difference between the two offences is in the subject of committing the offence. While in Section 269 para. (2) annulled by the Constitutional Court in the CCDec., the directly protected legal subject covered the Hungarian nation, other nationality, peoples,

religion or race, the legal subject directly protected in the CC provision under the present review is the national symbols of the Republic of Hungary as specified in the Constitution. Consequently, the legal subjects are basically different as far as the constitutional restriction of the freedom of expression and the enhanced criminal law protection are concerned.

In restricting the freedom of expression by measures of criminal law, as far as the question of proportionality is concerned, it must be examined whether the application of other legal tools is expected and, even in the lack of other tools, whether the weight of the penal sanction concerned is in line with the offence. However, in the present case, the wide-scale application of damages mentioned in the CCDec. as a legal tool of prevention cannot be taken into account. When examining restriction by criminal law, Decision 36/1994 (VI. 24.) AB pointed out that the freedom of expression only involves the freedom of judgement, characterisation, opinion and criticism (ABH 1994, 219, 231.). The defamation of national symbols is not a conduct of the above kind. In the lack of other applicable legal tools, the use of a criminal law rule (with a relatively minor sanction in the system of criminal law) cannot be deemed disproportionate.

According to Decision 21/1996 (V. 17.) AB, the definition and the sanctioning of criminal offences are within the powers of the legislature, over which control is exercised by the Constitutional Court in exceptional cases only (ABH 1996, 74, 82.). Therefore, it is within the discretionary powers of the Parliament to decide on either institutionalising independently specified criminal law protection for the national symbols, or remaining satisfied with applying to the said conduct the criminal liability specified in Section 271 of the CC.

The Constitutional Court holds that expressing negative opinions concerning the national symbols as well as scientific views, artistic expressions and criticism related to the history, value and public law significance of the ensigns, and also putting forward proposals on modifying or ceasing them are naturally out of the scope of criminal sanctioning as they are part of the constitutional freedom of expression.

7. In the opinion of the Constitutional Court, the petitioner's statement on the discriminative character of the CC rule concerned is unfounded, too. The respective rule of the CC provides criminal law protection only for the national symbols specified in and protected by the Constitution. It is within the discretionary powers of the legislature to extend the criminal law

protection to national symbols of foreign states in addition to the national symbols specified in the Constitution.

Based on the above, the Constitutional Court establishes that Section 269/A of the CC is not unconstitutional but it is in compliance with the requirements of constitutional criminal law, and, therefore, it rejects the petitions according to the holdings.

With due regard to the importance and the public interest of the subject covered by this Decision, the Constitutional Court deemed justified to publish it in the Hungarian Official Gazette.

Budapest, 8 May 2000

Dr. János Németh

President of the Constitutional Court

Dr. István Bagi
Judge of the Constitutional Court

Dr. Mihály Bihari
Judge of the Constitutional Court

Dr. Ottó Czúcz
Judge of the Constitutional Court

Dr. Árpád Erdei
Judge of the Constitutional Court

Dr. Attila Harmathy
Judge of the Constitutional Court

Dr. András Holló
Judge of the Constitutional Court

Dr. László Kiss
Judge of the Constitutional Court

Dr. István Kukorelli
presenting Judge of the Constitutional Court

Dr. János Strausz
presenting Judge of the Constitutional Court

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

Concurring reasoning by Dr. Árpád Erdei, Judge of the Constitutional Court

I agree with the Constitutional Court rejecting the petitions seeking the establishment of the unconstitutionality and the annulment of Section 269/A of the CC. However, the point in the reasoning of the decision mentioning that national symbols have a twofold meaning as, on the one hand, they are the external form of representing statehood and the sovereignty of the state, and, on the other hand, they are tools to express belonging to the nation as a community, allows and calls for drawing certain conclusions not mentioned in the reasoning.

The statutory definition found in 269/A of the CC restricts the freedom of expression by the tools of criminal law. The reasoning of the decision details the opinion of the Constitutional Court on the conditions of restricting a fundamental right as contained in the reasoning of Decision 30/1992 (V. 26.) AB. It quotes the same decision also in respect of the express opinion on restricting the freedom of expression.

Accepting the statement made in this Decision that in the present case, the freedom of expression collides with other normative constitutional values directly deductible from the Constitution, and the structure of the concrete norm of criminal law is different from the norms serving as a basis of the former review performed by the Constitutional Court (IV. 2.), it should be pointed out that the constitutionality of the statutory definition contained in Section 269/A of the CC is based not only on the above grounds, but also on restricting the freedom of expression in order to protect the dignity of the community.

The Constitutional Court pointed out in Decision 30/1992 (V. 26.) AB that the freedom of expression has a special position among constitutional fundamental rights and the freedom of expression has primacy over most of the other rights. Nevertheless, it also stated that human dignity – to which every human being has an inherent right according to Article 54 para. (1) of the Constitution – may restrict the freedom of expression, and the dignity of communities may do so as well. The Constitutional Court acknowledged the applicability of the measures of criminal law for the protection of human dignity and the dignity of communities (ABH 1992, 167, 174, 181).

Section 269/A of the CC provides for the prohibition of defaming the national symbols specified in Articles 75 and 76 of the Constitution. From the aspect of criminal law, this prohibition is applicable without regard to the twofold meaning of national symbols; the provision of the CC alone does not refer to the twofold meaning. The twofold meaning can be deducted from the examination of the constitutional provisions, although even the title of Chapter XIV regulating the ensigns "The Capital and National Symbols of the Republic of Hungary" demonstrates clearly that the symbols have both state and national characters. However, assessing the constitutionality of Section 269/A of the CC can – among others – be based on revealing the content of the twofold meaning.

As mentioned in the Decision, by using the national symbols, the members of the community can express their conviction of belonging to the Hungarian nation or the State of Hungary – or to both. Indeed, belonging to the nation or being a citizen of the State does not necessarily overlap: there are people who consider themselves ones belonging to the Hungarian nation although they are the citizens of another state, and similarly, there are Hungarian citizens who do not belong to the Hungarian nation. On the above basis, there are at least two communities distinguishable, namely, the community of those who belong to the Hungarian nation and the community of the citizens of the State of Hungary. Of course, the vast majority of the two communities are overlapping: most of those who belong to the Hungarian nation are the citizens of the Republic of Hungary and most of the Hungarian citizens are of Hungarian nationality.

The fact that in the course of history, the symbols of the Hungarian nation have also become the symbols of the sovereignty of the State of Hungary explains why the Hungarian citizens who are of other nationality can treat those symbols as ones expressing their own feelings and belonging to their own community. For them, the symbols bear a significance related to statehood rather than to nationality. This way, the citizens of both Hungarian and non-Hungarian nationality of the Republic of Hungary may require to have the symbols specified in the Constitution honoured by all. As far as the symbols are concerned, the community of the State's citizens is determined by their relation to the State (regardless of their national identity), and the dignity of this community may also restrict the freedom of expression.

In the reasoning of the Decision, the dignity of the community should have been better underlined in assessing the constitutionality of Article 269/A of the CC. This way, the arguments contained in Decision 30/1992 AB about restricting the freedom of expression would have been maintained with adequate emphasis.

Budapest, 8 May 2000

Dr. Árpád Erdei
Judge of the Constitutional Court

In witness whereof.

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Concurring reasoning by Dr. Attila Harmathy, Judge of the Constitutional Court

1. The provision of Section 269/A of the CC challenged by the petitioners covers a conduct qualifying as a specific case of expressing one's opinion. As the conduct defined in the rule concerned is a criminal offence, the freedom of expression has become restricted in this aspect, and the restriction is specified in a rule of criminal law.

2. Among the fundamental rights, the Constitution provides in Article 61 that everyone shall have the right to express his opinion. According to Article 8 para. (1), the protection of fundamental rights is a primary obligation of the State, and consequently – as provided for in Article 8 para. (2) – the rules pertaining to fundamental rights and obligations shall be determined by an Act of Parliament; however, even an Act of Parliament shall not impose any limitation on the essential contents of fundamental rights.

In assessing the constitutionality of the challenged provision, the Constitutional Court's examination was based upon the International Covenant on Civil and Political Rights adopted by the General Assembly of the United Nations in 1966 and promulgated in Hungary in Law-Decree 8/1976 (hereinafter: the Covenant) and the Convention on the Protection of Human Rights and Fundamental Freedoms adopted in 1950 by the members of the Council of Europe and promulgated in Hungary in Act XXXI of 1993 (hereinafter: the Convention) as well as the practice of the European Court of Human Rights. The Covenant and the Convention defined how human rights may be restricted, and the judicial practice interpreted the relevant rules. The Constitutional Court, too, has expressed its opinion in several decisions on the restriction of human rights.

3. In the practice of the European Court of Human Rights, the restriction of human rights is required to be based on an Act of Parliament. This requirement is related not only to the need to enact the restricting rule in the form of an Act of Parliament, but it covers the contents of the law as well by prescribing that the wording of the restrictive rule should allow the citizen to foresee – with legal aid if needed – what consequences his conduct may entail. (The requirements as applied by the Court can be read in the Court Reports published recently on the case 25390/94 *Rekvényi vs Hungary*, Court Reports 1999/12, p. 954)

The challenged rule of the CC was enacted in Act XVII of 1993 on the amendment of penal statutes, introducing Section 269/A in the CC. In the present case, the intelligibility and

the accuracy of the rule are in line with the principles established in the practice of the Court. Therefore, it can be established that the regulation is based on an Act of Parliament.

4. In assessing the restriction of human rights, it must be examined according to the European Court of Human Rights whether the aim of the restriction is acknowledged by the Convention. It results from the contents and the structural position of Section 269/A of the CC that the aim of the provision is protecting the symbols of independence of the State of Hungary and in relation to that, protecting the rights of others – according to the wording of the Convention. In compliance with Article 10 (2) of the Convention, the freedom of expression may be restricted in order to protect the rights of others.

In recent years, the European Court of Human Rights reinforced the acknowledgement of statutorily restricting the freedom of expression for the purpose of protecting religious conviction or religious feelings against defaming or shocking conducts. The Court evaluated such a restriction as restricting the freedom of thought, conscience and religion specified in Article 9 (1) of the Convention for the purpose of protecting “the rights of others” as mentioned in Article 10 (2) of the Convention (*Otto-Preminger-Institut vs Austria* judgement, 20 September 1994, Series A no. 295-A, p. 14, § 48; *Wingrove vs United Kingdom* judgement, 22 October 1996, no. 19/1995/525/611, § 48).

5. It has been pointed out on the basis of the Constitution in Decision 30/1992 (V. 26.) AB defining the principles of restricting the freedom of expression by rules of criminal law that it is not unconstitutional to restrict the fundamental right in an Act of Parliament if this is the only way to secure the protection or the enforcement of another fundamental right or to protect another constitutional value, and the restriction is not of disproportionate weight as compared to the purported objective. It has also been stated in the decision that the protection of the dignity of communities may constitutionally justify the restriction of the freedom of expression (ABH 1992, 167, 171, 181). The Constitutional Court examined in its Decision 36/1994 (VI. 24.) AB the practice of the European Court of Human Rights as well, and in this respect, it emphasised that the constitutionality of restricting a fundamental right may only be acknowledged if the restriction is necessary for the protection of another fundamental right or liberty or for the protection of another constitutional aim, and the restriction complies with the requirement of proportionality (ABH 1994, 219, 222, 224-225).

In Decision 31/1994 (IV. 2.) AB concerning the use of the coat of arms of the Republic of Hungary and of certain expressions referring to the sovereignty of the State, the

Constitutional Court expressed the special position of the coat of arms by holding that only public authorities are allowed to use the coat of arms (ABH 1994, 168, 171). As far as the criminal law protection of the person of the President of the Republic is concerned, Decision 48/1991 (IX. 26.) AB points out that it attaches greater importance to sanctioning the defamation of national symbols (flag, coat of arms, and national anthem) as compared to the protection of a person representing the unity of the nation according to Article 29 of the Constitution (ABH 1991, 217, 238).

6. The above decisions of the European Court of Human Rights acknowledged the statutory objective of protecting the rights of others by restricting the freedom of expression in respect of religious convictions and religious feelings. One's feelings about belonging to a country or homeland are similar to religious feelings. This feeling can be violated by using expressions defaming or degrading the State's symbols, or by committing other similar acts. Restricting the freedom of expressing one's opinion through such acts is in line with the requirements established in the practice of the Court, in terms of the aspects of both form and content, and it is also in compliance with the practice of the Constitutional Court to allow an Act of Parliament to restrict the freedom of expression for the purpose of protecting the rights of others, and to secure special protection for the symbols of the Republic of Hungary.

7. According to Article 10 (2) of the Convention, it is a condition of restricting human rights that the protection on the above rights or interests is made necessary in a democratic society. According to the practice of the Hungarian Constitutional Court, the restriction of a fundamental right is acknowledged if it is the only way to secure the protection or the enforcement of another fundamental right or to protect another constitutional value, and the restriction is proportionate [Decision 36/1994 (VI. 24.) AB, ABH 1994, 219, 222]..

Both Article 19 (3) of the Covenant and Article 10 (2) of the Convention provide that exercising the right to the freedom of expression carries with it duties and responsibilities as well. Both judgements of the European Court of Human Rights referred to above examine the offensive nature of the opinion in the context of the duties and responsibilities carried by the freedom of expression. Both judgements evaluate in compliance with the particular features of the countries concerned the social necessity and the proportionate nature of the restriction regarding the objective acknowledged in the Convention (*Otto-Preminger-Institut vs Austria* judgement, 20 September 1994, Series A no. 295-A, p. 15, § 49, 50; *Wingrove vs United Kingdom* judgement, 22 October 1996, no. 19/1995/525/611, § 52, 53, 57-58). The Court

judged the social causes necessitating the restriction by taking into account the particular features of Hungarian history in the case *Rekvényi vs Hungary* (Court Reports 1999/12 p. 956).

In the period of 40 years before the change of the regime, the attachment to the country was overshadowed by internationalism, and the role of the related symbols was degraded, the coat of arms was changed, police intervention occurred on a regular basis on national holidays, and the use of national flags or tricolour ribbons at such events was treated as a politically suspicious act. After the change of the regime, the emotions of belonging to the country were reinforced and the honour paid to the symbols of the State's independence increased as well. The constitutional provisions on the national symbols were enacted in 1989 and 1990. It is the ground that justifies Article 76 para. (3) of the Constitution specifying that the positive vote of two-thirds of the Members of Parliament are needed to adopt an Act of Parliament on the coat of arms and the flag of the Republic of Hungary and the use thereof.

8. According to the comparative study, there are criminal law rules in many European countries restricting the freedom of expression concerning the ensigns of the State in question. Consequently, it is held necessary in these countries to prevent the expression of opinion offending the ensigns of the independent state in a democratic state and to sanction the conducts that may shock people who feel attached to the state concerned. [[The Constitutional Court of Germany stated in one of its judgements that it is in the interest of the Federal Republic of Germany that its citizens identify themselves with the values represented by the national flag as a symbol, and, therefore, it acknowledged the constitutionality of the criminal law provision on the defamation of the flag /BVerfGE 81, 278, 294 (1990)/]. Taking into account the particular features of Hungarian history, this can be demanded to a greater extent in Hungary, where the defamation of the national symbol may even seem frightening in certain cases.

Decision 30/1992 (V. 26.) AB, which declared the unconstitutionality of and annulled Section 269 of the CC ordering the punishment of expressing opinions defaming the Hungarian nation, other nationalities, peoples, religion or race, is not in contradiction with the above arguments. The said decision, although containing some statements on the general principles of the freedom of expression, deals with the freedom of openly criticising the activities of the state organs and of the local governments as well as with expressing one's opinion in front of a large public gathering, which – according to the decision – “means, in fact, the freedom of the press”, and thus the decision primarily protects the freedom of the

press (ABH 1992, 167, 180). The provision under Section 269/A of the CC enacted in an Act of Parliament in 1993 after the adoption of the above decision covers a conduct different from the one that had been defined in the annulled Section 269 as in this case there is a “danger of violating several individual rights”, which is a cause acknowledged even in the decision as one justifying protection (ABH 1992, 167, 179). In the practice of the Constitutional Court, the right to human dignity is qualified as a general personality right, a specifically defined case of which is the right to the freedom of religion and conscience [Decision 4/1993 (II. 12.) AB, ABH 1993, 48, 51]. Although one's feeling of belonging to the country is not a specifically defined right, it is – similarly to the right to the freedom of religion and conscience – part of the right to human dignity as a general personality right. Restricting the freedom of expression is justified by preventing the injury of the above right.

9. In restricting the freedom of expression by measures of criminal law, as far as the question of proportionality is concerned, it must be examined whether the application of other legal tools can be expected and, even in the lack of other tools, whether the weight of the penal sanction concerned is proportionate to the offence. In the present case, however, the wide-scale application of damages mentioned in Decision 30/1992 (V. 30.) AB as a legal tool of prevention cannot be taken into account. When examining restriction by criminal law, Decision 36/1994 (VI. 24.) AB pointed out that the freedom of expression only involves the freedom of judgement, characterisation, opinion and criticism (ABH 1994, 219, 231). The defamation of national symbols is not a conduct of the above kind. In the lack of other applicable legal tools, the use of a criminal law rule (with a relatively minor sanction in the system of criminal law) cannot be deemed disproportionate.

Budapest, 8 May 2000

Dr. Attila Harmathy
Judge of the Constitutional Court

Concurring reasoning by Dr. István Kukorelli, Judge of the Constitutional Court

In line with the Constitutional Court's consistent opinion, the fundamental right to the freedom of expression enjoys extraordinary constitutional protection and it may only be restricted in especially justified cases. The Decision underlines the fundamental statement made in Decision 30/1992 (V. 26.) AB that “the right to free expression must give way to

very few rights only, that is, the laws restricting this freedom must be strictly construed. The laws restricting the freedom of expression are to be assigned a greater weight if they directly serve the realisation or protection of another individual fundamental right, a lesser weight if they protect such rights only indirectly through the mediation of an institution, and the least weight if they merely serve some abstract value as an end in itself (public peace, for instance).” (ABH 1992, 178).

In the present case, the Constitutional Court acknowledged that in the interest of protecting the national symbols accepted as constitutional values in Articles 75-76 of the Constitution, the freedom of expression may be restricted on an exceptional basis. As the laws restricting the freedom of expression, including Section 269/A of the CC, must be strictly construed, the Constitutional Court pointed out – primarily for the judiciary branch – that “expressing negative opinions concerning the national symbols as well as scientific views, artistic expressions and criticism related to the history, value and public law significance of the ensigns, and also putting forward proposals on modifying or ceasing them are naturally out of the scope of criminal sanctioning”.

Although the above statement, made as part of the reasoning, is to be followed by the courts, in my opinion, it would have been better to express this constitutional requirement related to the application of Section 269/A of the CC in the holdings of the Decision. The Constitutional Court applied the same method for example in Decision 36/1994 (VI. 24.) AB when it limited the scope of application of libel and defamation in the case of politicians and those who exercise public power in order to secure the freedom of expression. (ABH 1994, 219).

In the defamation of national symbols, the extent of danger posed by the conduct to society has a key role. Dangerousness to society is an essential element of any criminal offence (Section 10 of the CC). According to the concordant opinion expressed in the judicial practice, dangerousness to society is a legislative category on the one hand and a judiciary category on the other hand. It is a legislative category in the sense that when the legislature created the CC, it ordered the punishment as criminal offences of the statutorily defined human conducts assessed as dangerous to society. However, the courts must in each case examine the concrete dangerousness to society of the conduct performed as well as the level thereof. As a result, the courts may conclude that a conduct satisfying the statutory definition is not a criminal offence as at the time of perpetration it did not pose a danger to society (BH 1994, 471).

By enacting Section 269/A of the CC, the legislature declared the dangerousness to society of the conduct of anyone who “in front of a large public gathering uses an offensive or

denigrating expression against the national anthem, flag or coat of arms of the Republic of Hungary, or commits other similar acts”. By the constitutional requirement established by the Constitutional Court on the basis of interpreting Article 61 of the Constitution, it limited the potential scope of application of this statutory definition. No dangerousness to society may be established in the case of merely expressing a negative opinion about the national symbols or of a scientific criticism or even in case of an artistic expression representing these symbols in a disconcerting way or using them as particular tools of demonstration. In this sense, the freedom of expression, furthermore, artistic and scientific freedoms enjoy primacy over the criminal law protection of national symbols.

By acknowledging the constitutionality of Section 269/A of the CC, the Constitutional Court has not changed its opinion about the primary importance of the freedom of opinion as one of the most important criteria of democracy. The practice of the Constitutional Court can be considered consistent from Decision 30/1992 (V. 26.) AB establishing the unconstitutionality of “mudslinging”, as a form of incitement against the community, to Decision 12/1999 (V. 21.) AB, also dealing with incitement against the community. Section 269/A of the CC demanded a special approach as the national anthem, the coat of arms and the national flag of the Hungarian Republic enjoy enhanced constitutional protection.

Budapest, 8 May 2000

Dr. István Kukorelli
Judge of the Constitutional Court

Concurring reasoning by Dr. János Németh, Judge of the Constitutional Court

I agree with declaring the constitutionality of Section 269/A of the CC, but in my opinion, the following should be pointed out in relation to the reasoning of the decision:

1. The statutory definition of defaming the national symbols is in many aspects similar to or identical with Section 269 para. (2) of the CC annulled by Decision 30/1992 (V. 26.) AB of the Constitutional Court. It is a common feature that both statutory definitions sanction the use of offensive or denigrating expression in front of a large public gathering or the committing of other similar acts. It is also a similarity that in both cases the conducts violate (among others) the dignity of the Hungarian nation. There is a certain difference between the

two statutory definitions, as Section 269 para. (2) of the CC protected the Hungarian nation (and other nationalities, peoples, religion or race) with the tools of criminal law, while the penal provision forming the subject of this Decision criminalises the same conducts committed against the national symbols of the Republic of Hungary.

As the Constitutional Court found Section 269 para. (2) of the CC unconstitutional and annulled it, but it does not deem appropriate to do so in the case of Section 269/A of the CC, one may ask on the basis of the seemingly slight difference between the two statutory definitions whether it is so because the Constitutional Court has modified its opinion on the mutual relation between the freedom of expression and criminal law, consistently maintained since Decision 30/1992 (V. 26.) AB, or whether, despite the basic similarity of the statutory definitions, they bear significant differences leading to the declaration of unconstitutionality in the first case and not leading to a similar result in the second case. Due to the determining constitutional value of the freedom of expression and its role as a communicational mother right, expressed in many former decisions of the Constitutional Court, this question should have been answered in a very clear and definite manner. I partly miss it from the reasoning.

2. The decision gives a twofold answer on justifying the different evaluations of Section 269 para. (2) and Section 269/A of the CC.

On the one hand, it argues that the national anthem, the flag and the coat of arms, i.e. the national symbols, are the institutions of the Constitution itself as Articles 75 and 76 of the Constitution define them and the legislation on the national symbols require the qualified majority of the Parliament – this is why such symbols enjoy a high level of protection and this is why, among others, their criminal law protection is not disproportionate. I disagree with the above argument considered in the reasoning to be of primary importance. As far as the constitutionality of the criminal law protection is concerned, the element that these symbols are defined or contained in the Constitution has no relevance. Putting a greater emphasis on this would make it impossible to justify why it is unconstitutional (as explained in Decision 30/1992 (V. 26.) AB) to punish expressions and acts offensive or denigrating for the Hungarian nation which is in the core of all provisions and the whole of the Constitution, and why it is not unconstitutional to protect against defaming the symbols of this nation – in other words, why the symbols are protected more than the value they represent.

Essentially, the reasoning contains the elements of the most important justification I consider to have priority, proving the constitutionality of Section 269/A of the CC. I agree with point IV.3 of the Decision referring to the historical background, the fact that after many decades of a totalitarian regime overshadowing national feelings by internationalism, the relation to our national symbols has been revalued. However, the structure of the reasoning suggests that the main cause of the constitutionality of the penal sanction is that the symbols are contained in the Constitution and the historical situation is only of secondary or ancillary importance. On the contrary, in my opinion, it is the historical situation of transition that has a determining role in the constitutionality of the criminal law protection of national symbols, and not the fact that the symbols are defined and contained in the Constitution – the latter alone would not give due ground for the rejection of the petition. Basically, the historical situation would have given a greater emphasis in justifying the constitutionality of Section 269/A of the CC. The above argument has been presented in many judgements of the European Court of Human Rights stating that in the period of transition from a totalitarian state model into a democratic society, until the final consolidation of democratic institutions and for the protection of democratic institutions under formation, certain human rights and freedoms may temporarily be restricted even in cases where it would be unjustified in a country with uninterrupted democratic development.

3. I also disagree with the argument stating that the criminal law protection of the national symbols is justified by the fact that the conviction and the feeling of belonging to a certain state deserve similar protection as religious convictions and feelings.

In this respect, the reasoning of the Decision refers to two judgements of the European Court of Human Rights acknowledging the application of penal sanctions upon using offensive expressions violating the religious feelings of others as a legitimate restriction of the freedom of expression. The examples quoted are not to the point. The two judgements mentioned establish that applying a criminal sanction on using expressions of extremely and unusually rude profanity for the protection of the religious feelings of others does not violate the freedom of expression. Such judgements cannot be used as adequate reference on the sanctioning of conducts – using offensive or denigrating expressions or committing a similar act – the statutory definition of which reflects that it may also cover expressions which are not of an extremely rude and abusive nature.

Moreover, I cannot accept comparing national feelings to religious feelings as in this respect the opinion of the society may be divided; the Constitutional Court should not take a position in a question that belongs into the sphere of individual conviction and taste, especially – as it is in the present case – if taking a position is not unavoidably necessary for the ruling in the matter.

Consequently, in my opinion – with the shifts in the reasoning I pointed out – Section 269/A of the CC is in line with the freedom of expression specified in Article 61 of the Constitution. Laying an emphasis on the above arguments is important for clarifying that in adopting this Decision, the Constitutional Court kept on building upon the criteria it had elaborated in its former decisions concerning the relation between criminal law and the freedom of expression. This is why I deeply agree with the following part of the reasoning: “The Constitutional Court holds that expressing negative opinions concerning the national symbols as well as scientific views, artistic expressions and criticism related to the history, value and public law significance of the ensigns, and also putting forward proposals on modifying or ceasing them are naturally out of the scope of criminal sanctioning as they are part of the constitutional freedom of expression” (point IV.6). However, taking into account the key importance of the above statement, in my opinion, it would have been appropriate to include it not only in the reasoning, but also in the holdings of the Decision as a constitutional requirement for the application of Section 269/A of the CC.

Budapest, 8 May 2000

Dr. János Németh
Judge of the Constitutional Court

Constitutional Court file number: 763/B/1995

Published in the Official Gazette (Magyar Közlöny) MK 2000/46