

HUN-2008-2-005¹

a) Hungary / b) [Constitutional Court](#) / c) / d) 03-07-2008 / e) 95/2008 / f) / g) *Magyar Közlöny* (Official Gazette), 2008/98 / h) .

Keywords of the Systematic Thesaurus:

- [3.10](#) General Principles - **Certainty of the law.**
- [5.3.1](#) Fundamental Rights - Civil and political rights - **Right to dignity.**
- [5.3.21](#) Fundamental Rights - Civil and political rights - **Freedom of expression.**
- [5.3.31](#) Fundamental Rights - Civil and political rights - **Right to respect for one's honour and reputation.**

Keywords of the alphabetical index:

[Hatred, incitement.](#)

Headnotes:

The legislature may only resort to criminal law to restrict free expression in extreme cases. These are the so-called most dangerous acts that are "capable of whipping up intense emotions in the majority of people", that endanger fundamental rights with a prominent place among constitutional values, and which pose a clear and present danger of a breach of the peace.

Summary:

I. At its session of 18 February 2004, the Parliament adopted an Act on the Amendment of Act IV of 1978 on the Criminal Code. It brought in a new statutory definition of hate speech. It made hate speech a criminal offence punishable by up to two years in prison.

The new Article 181/A. of the Criminal Code targets the use or circulation of expressions concerning the Hungarian nation, or any other group of people (especially an ethnic, a religious or a racial group), or gestures reminiscent of a totalitarian regime, which could denigrate a member of a given group or damage human dignity. Such behaviour, in front of a large public gathering, constitutes a misdemeanour and attracts a prison sentence of up to two years.

Under Article 181/A.3, somebody committing such a misdemeanour in connection with a political party or political operation of an NGO could not be punished.

The President of the Republic did not sign the Amendment because he had concerns over its constitutionality. Exercising the power vested in him by Article 26.4 of the Constitution, he initiated a constitutional review of the Amendment.

The President was concerned that the Amendment restricted freedom of expression to an unacceptable degree. He pointed out that the statutory definition of the Amendment

¹ Source: [http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-2008-2-005?fn=document-frameset.htm\\$f=templates\\$3.0](http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-2008-2-005?fn=document-frameset.htm$f=templates$3.0)

was very close to the offence of "disparagement" declared unconstitutional by the Court in its Decision no. 18/2004.

II. The Constitutional Court emphasised that the right to free expression under Article 61 of the Constitution protects opinion irrespective of the value and veracity of its content. The Constitution guarantees free communication and it is not the content to which the right of free expression relates. This is because everyone has an equal right to speak and to express him or herself. Therefore, the right to free expression cannot be restricted in order to protect someone from damaging, denigrating or offensive opinions. The possible consequences of the speech, not its content, may justify certain restrictions on the right to free speech. There is settled case law from the Court on this point, in Decisions nos. 30/1992, 12/1999, 18/2004. The legislature may only resort to criminal law to restrict free expression in extreme cases. These are the so-called most dangerous acts that are "capable of whipping up intense emotions in the majority of people", that endanger fundamental rights with a prominent place among constitutional values, and which pose a clear and present danger of a breach of the peace.

By adopting the Amendment, the legislature significantly extended the scope of the prohibited act beyond the limits set out in the relevant case law of the Constitutional Court.

When adopting the new Article 181/A. of the Criminal Code, the legislature maintained as conduct constituting a misdemeanour the use and circulation of disparaging expressions or the making of gestures reminiscent of a totalitarian regime. However, as the Court mentioned several times, communications below the level of incitement are protected by Article 61.1 of the Constitution. Restriction on freedom of expression is only justified by incitement incorporating a level of danger above a certain limit. The use and circulation of disparaging expressions or the making of gestures reminiscent of a totalitarian regime (such as use of the Nazi salute), do not per se result in the clear and present danger of a forcible act. In many cases, such conduct does not even pose a threat of violation to individual rights.

The Court also stressed that the aggrieved parties of the misdemeanour are not concrete persons, neither are they clearly defined members of a group. The new statutory definition of hate speech is an immaterial offence that does not require the violation of individual rights or even a threat to them. A person could be convicted of an offence even if no one's personal rights were violated. It would be sufficient if the expression used or the gesture in an abstract sense were capable of violating the human dignity of a member of the affected group.

The aim of the Amendment is to punish hate speech even if the injured party cannot be identified, and disparagement is based on belonging to a national, ethnic, racial or religious group. In the Court's view, it is a legitimate aim to protect people who refuse to become a captive audience forced to listen to hate speech. The problem is that the challenged provision would have punished all forms of hate speech, including racist expressions which contain generalisations and for which the public (including the affected group) is not forced to be an audience.

Therefore, the Court held that the Amendment does not reach the level of culpability defined by the Court's well-established case-law. The violation of specific individual

fundamental rights and disturbing the public peace are not preconditions of the misdemeanour. The Amendment was therefore considered an unnecessary and disproportionate restriction to the freedom of expression granted by Article 61.1 of the Constitution.

Justice Péter Kovács attached a concurring opinion to the judgment. He emphasised that even the jurisprudence of the Constitutional Court does not preclude the punishment of expressions that do not reach the level set by the Court in its Decision no. 30/1992. He mentioned Decision no. 14/2000 on the use of totalitarian symbols. Besides, Justice Péter Kovács emphasised that international instruments allow for the punishment of hate speech in a broader sense than that accepted by the Court. However, he agreed with the court in holding the Amendment unconstitutional, since it did not meet with the requirement of legal certainty.

Justice Miklós Lévay wrote a concurring opinion to the decision. He disagreed with the Court's statement that the right to free expression was protected regardless of its content. According to him, when the Court kept in line with the US Supreme Court, it did not take into account the fact that some speech is not even protected under the US First Amendment. In some cases, the Constitutional Court upheld content-based legal regulations (e.g. the statutory definition sanctioning the use of symbols of despotism in Decision no. 14/2000). However, he also held that the challenged Amendment did not comply with the requirement of legal certainty.

Justice László Kiss attached a dissenting opinion to the judgment. He argued that the Court should not simply have assumed that in a free and democratic society the expression of extreme opinion does not endanger the foundations and operations of society. In expressing such views, the discriminator confines him or herself to the periphery. The fact remains that neither the case-law of the judiciary nor of the Constitutional Court is capable of protecting human dignity against the almost unlimited protection of free expression.

Cross-references:

See previous "hate speech" cases of the Court:

- Decision no. 30/1992, *Special Bulletin Leading Cases 2*, [[HUN-1992-S-002](#)];
- Decision no. 12/1999, *Bulletin 1999/3* [[HUN-1999-3-003](#)];
- Decision no. 18/2004, *Bulletin 2004/1* [[HUN-2004-1-004](#)].

[Languages:](#)

Hungarian.