

## MATTER OF CONTEXT? ON LEGAL AND POLITICAL ASPECTS OF UNDERSTANDING TOTALITARIAN SYMBOLS

### ¿Cuestión de contexto? Aspectos jurídicos y políticos de la comprensión de los símbolos totalitarios

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#### Resumen

La prohibición de los símbolos de los regímenes totalitarios está generalmente aceptada en Europa, aunque constituye una notable limitación de la libertad de expresión. La razón legítima para ello es la situación histórica en la que las víctimas de los regímenes totalitarios aún conviven con nosotros, y las democracias relativamente jóvenes quieren evitar el retorno de ideas tóxicas y dictaduras. La peculiaridad del discurso simbólico es que los símbolos utilizados pueden tener múltiples significados, por lo que puede ser necesario castigar el uso de estos símbolos sólo en caso de promover sistemas e ideologías totalitarias. Este artículo pretende analizar la normativa legal centroeuropea (y los giros en húngaro) y los casos derivados de la prohibición; señalando la coherencia con la que los tribunales tienen en cuenta el contexto del uso de los símbolos y el trasfondo histórico de los mismos.

#### ■ Palabras clave:

Libertad de expresión; Discurso simbólico; Símbolos totalitarios; Esvástica; Código penal; CEDH

#### ■ Keywords:

Freedom of expression; Symbolic speech; Totalitarian symbols; Swastika; Criminal code; ECtHR

#### Abstract

The ban of symbols of totalitarian regimes is generally accepted in Europe although constituting a remarkable limitation on the freedom of expression. The legitimate reason for this is the historical situation in which the victims of totalitarian regimes still live with us, and the relatively young democracies want to prevent the return of toxic ideas and dictatorships. The peculiarity of symbolic speech is that

the symbols used can have multiple meanings, so there may be a need to punish the use of these symbols only in case of promoting totalitarian systems and ideologies. This paper aims to analyse

Central European (and the turns in Hungarian) legal regulation and cases arising from the prohibition; pointing out how consistently the courts take into account the context of the use of symbols and the historical background of symbols.

I. The semiotics of totalitarian symbolism - signs, signifiants: 1. Function of symbols in expression; 2. On the symbolism of totalitarian regimes – II. On Criminal Law Instruments: 1. Standards?; 2. Central European Solutions (?); 3. Turns in the Hungarian regulations and Constitutional Court case law: 3.1. New impulses for criminal legislation against totalitarian regimes; 3.2. The specific prohibition: the use of the totalitarian symbol (Criminal Code, Section 335) – III. New front-lines: in other branches of law... 1. Name choices that may be associated with totalitarian regimes; 2. Commercialisation of totalitarian symbols – IV. Lessons Learned – V. References

Three generations have passed since the fall of the Nazi regimes and one generation since the fall of the Communist regimes in Central and Eastern Europe. It is our experience that these totalitarian regimes leave a mark in contemporary collective consciousness, which appears in both political and constitutional narratives. Under constitutional historical narrative, I mean that a particular doctrine of history is used to legitimise the regulation of various constitutional institutions, and even to test fundamental rights; this, in turn, organises (into a story or narrative) the relevant historical events in order to justify constitutional structures. The subject of this article is based on the dimension of constitutional narrative, which underpins legal interpretation and arguments related to the aftermath of totalitarian regimes; in particular, it strengthens the toolbox of the struggle against totalitarian symbols. However, it is a peculiarity of history that its events get farther away, so that the passage of time relativizes certain sensitive issues. For us, history may be used in constitutional reasoning in two ways, to protect the human dignity of victims and to defend democratic constitutional values.

Legislative provisions prohibiting the use of symbols of totalitarian regimes restrict freedom of expression. Criminal law is the generally discussed area of law in this topic, however, I open up the subject of the investigation in two directions: I present Central European examples in this subject, considering also other branches of law.

## I. THE SEMIOTICS OF TOTALITARIAN SYMBOLISM - SIGNS, SIGNIFIANTS

### 1. Function of symbols in expression

Expression may be realised through words –written and oral communication– and also in other forms, such as body language, artwork and symbols. Compared to words, visual speech adds additional layers or variations of meaning to the communication situation. While this may lead to intolerable ambiguity in certain situations (think of the need for precision in a commercial contract), in other situations it may add value that does not weaken but rather appreciates the weight of speech-expression. Such added value may be the literary virtuosity or creativity and the added value of

reinforcing attitudes (emotional relation) to the message. I find it useful to outline some of the basic concepts of the sign theory, as it may be applied later in our explanations:

*“A sign is a perceptible phenomenon that means more or something different to the observer than may be perceived at the moment it arises; in other words, which represents or replaces a real or imaginary object, situation, idea or concept that differs from itself in part or in its entirety, for the person interpreting the phenomenon in question. What it evokes is the object or signifiant of the sign ... The sign source ... may be any manifestation of inanimate and living nature and of society... Whoever/whatever perceives the sign as such is the interpreter of the sign (its interpreter, in the case of deliberate and directed sign output); the response is the interpretation. The sign always spreads in some medium, ... and noise is a condition that may interfere with the identification of the sign in that channel. If the interpretation of the sign is not an automatic physiological-psychological process but is carried out by a learned system, the latter is called a code”<sup>1</sup>.*

As the US Supreme Court found, “the use of symbols is a primitive but effective way of expressing (communicating) views. By using a logo or flag to symbolise a system, view, institution or personality, we may reach people's minds in a shorter way”<sup>2</sup>. When defending the expression of opinions, courts interpret measures restricting freedom of expression in the light of the identical function of the forms of communication, but also of this specific effect. The Strasbourg European Court of Human Rights (ECtHR) case law did not so far include the “symbolic speech” doctrine, but categorically considered works of art or expression as use of symbols<sup>3</sup>. According to the summary of the Hungarian Constitutional Court, “A person expressing opinion may share his thoughts with his environment not only by words but also, for example, by using pictures, symbols or wearing a garment. On the basis of Constitutional Court Decision No.13/2000. (V. 12.) and No. 14/2000. (V. 12.) the use of symbols is a political expression, which is enshrined in Article 61 (1) of the Constitution as protected”<sup>4</sup>. With respect to certain symbols of symbolic speech, we will now focus on a specific context/message.

<sup>1</sup> HAVAS, Ferenc: *Nyelviség* (Linguistics) In: Pannon Enciklopédia. 1997. <https://www.arcanum.hu/hu/online-kiadvanyok/pannon-pannon-enciklopedia-1/magyar-nyelv-es-irodalom-31D6/a-nyelv-alapjai-3249/a-nyelviseg-havas-ferenc-324b/in-your-language-like-system-325B/>.

<sup>2</sup> *West Virginia State Board of Education v. Barnette*, 319 US 624/1943. In *Texas v. Johnson*, 491 U.S. 397 (1989), the Court stated that flag burning is an effective way of expressing criticism of the country and its governance. See also: MCGOLDRICK, James M. Jr.: “Symbolic Speech: A Message from Mind to Mind.” *Oklahoma Law Review* 2008/1. Available at: <http://digitalcommons.law.ou.edu/olr/vol61/iss1/1>

<sup>3</sup> BYCHAWSKA-SINIARSKA, Dominika: *Protecting the right to freedom of expression under the European Convention on Human Rights. A handbook for legal practitioners*. Council of Europe. 2017. pp. 17-18. Available: <https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814>

<sup>4</sup> 95/2008. (VII. 3.) Constitutional Court decision, III.2.2.

## 2. On the symbolism of totalitarian regimes

An interesting feature of totalitarian regimes is the use of a system of symbols with an ideological background. These symbols played an important role in the maintenance of the regime, and they continue to have an impact even after their fall. This latter phenomenon is likely to highlight the relevance of the social phenomena that produced totalitarian regimes and remained relevant in the socio-political context. Traditions and religiosity, which play an important role in the legitimacy of political power and order, and more precisely the rituals and symbols that emerge from it, play a central role in the establishment of political identity and in the cohesion of the political community. The symbolism and “iconography” of totalitarian regimes are closely related to political ideology, and most of these symbols have been chosen from the symbol set of ancient cultures, so their messages may be revealed in their knowledge. Regimes completely removed from democracy also required certain forms of social support, so that obedience, authority, and recognition are immanent parts of these symbols. Some common elements in the ideologies of totalitarian dictatorships emphasise the functions of symbols. Such ideological elements are community (nation, state), authority (party movement, existence of strict hierarchy), elimination of (private) property rights, scapegoating and militant ideas. These regimes had a strong control over the channels of communication to replace the organic elements of social culture with political propaganda, conformism, and authoritarianism<sup>5</sup>.

Totalitarian regimes generally existed at a time that defined a historical period, meaning that, for example, the relatively short period of Nazi dictatorship or the (Hungarian) Arrow Cross Party terror has left a lasting imprint on history in society’s collective memory. Longer-lasting totalitarian regimes have become a multi-generational experience with their invasion of the private sphere, and memory not only associates explicit symbols with these systems, but also many routine phenomena of everyday life. (Trabant, for example, as a symbol of communism, etc.). This, and in particular the attraction of totalitarian political regimes to symbols, results in a rather diverse symbolism of totalitarian regimes. However, the legal judgment of the symbols they use or that may be attached to them is served if we wish to make them explicit and consistent with reason. This is possible by explicitly naming some of these symbols, but also by grasping their attachment to the dictatorial regime. It is therefore worthwhile to make an inventory of the symbols that may be used if we set the goal to limit the use of symbolism used by totalitarian regimes.

The first round contains the symbols that were officially used by the respective dictatorial regimes. They may appear as symbols of the state or of the totalitarian state party (movement). Such symbols are the state coat of arms, flag, etc., or the official symbol of the party / movement; and since there is a complete interdependence between the state and the party, there is typically a great deal of overlap and mutual use of these symbols and their use. For the legal systems of posterity, these symbols

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<sup>5</sup> Basis of the overview: SVILIČIĆ, N. – MALDINI, P.: “Visual Persuasion and Politics: Ideology and Symbols of the Totalitarian Regimes’ - Case Study: Hammer and Sickle”. *Collegium Antropologicum*. 2013/2. pp. 570-573.

are the most obviously tangible regulatory objects. The swastika, the SS badge, the arrow-cross, the hammer and sickle and the five-pointed red star, which are named most often and also by the Hungarian Criminal Code, may be listed here.

They are peculiar to other symbols, which are linked to totalitarian regimes, but are not usual terms of criminal codes. This symbolism extends to symbols that have not reached the level of prohibition in a *particular legal system's criminal law policy*, either because, for some reason, the danger posed by their use seemed remote (e.g. Roman *fascēs*, the Franco regime's *fascēs* or other coat of arms); or because the symbol itself did not seem very specific (e.g. the uniforms of the armed organisations of dictatorships).

If we want to give a complete overview, we are undertaking a difficult task, since symbols exist in different areas of life, at different depths, with different institutionalisation and with a variety of social awareness. The symbolic message of the reference to the system may be carried by certain movements (arm raised greeting from the Nazis), certain personal names (due to the iconic personal cult Lenin, Hitler, etc.), expressions (“liberation”, “*lebensraum*”), books (typically *Mein Kampf*), music (dictators' favourite composers), statues (either depicting iconic figures or honouring the heroic deeds of the Red Army), other works (paintings, etc.), official political-ideological doctrines (race theory, class struggle), prominent calendar days (April 4, May 1, November 7, etc.), letters (quite recently the “Z” in Russia<sup>6</sup>). These symbols may appear more explicit and coded forms (e.g., it is generally believed that 88 is the numerical code for the Nazi *Heil Hitler* greeting<sup>7</sup>).

There are few independently created symbols: regimes are usually based on archaic roots, and seek to strengthen their legitimacy also in this way. The original meaning of the ancient symbols has been modified by an official ideology for its own benefit, and its fundamental meaning has been changed or discarded<sup>8</sup>. This essentially results in an interpretation challenge: a given symbol now carries multiple messages and, depending on its context and interpretation / communication field, it may be decoded in different ways. A court must have the knowledge about the evolutionary history of some of the symbols and, when judging the given situation, it must reveal the meaning layers and possible messages of the symbols accordingly.

We may also see a specific historical dynamic: prohibitions against symbols obviously arise after the collapse of regimes, when the obvious rationale for legitimacy and

<sup>6</sup> One of the interpretations: COLE, B.: “True Meaning Behind Russian 'Z' Symbol Finally Revealed.” *Newsweek*, 07.03.2022. Available: <https://www.newsweek.com/russia-ukraine-z-vremya-symbol-may-day-victory-1698904>

<sup>7</sup> For the variety of codes see <https://dasversteckspiel.de/> or dgs/SPIEGEL: “The Truth about 88. New Book Reveals Secret Meaning of Neo-Nazi Codes.” *Spiegel Online*, 2011. Available at: <http://www.spiegel.de/international/germany/the-truth-about-88-new-book-reveals-secret-meaning-of-neo-nazi-codes-a-770820.html>

<sup>8</sup> SVILIČIĆ, N. – MALDINI, P.: “Visual Persuasion and Politics: Ideology and Symbols of the Totalitarian Regimes’ - Case Study: Hammer and Sickle.” *Collegium Antropologicum*. 2013/2. p. 570.

identity politics is the positioning of the new system against the previous system<sup>9</sup>. On the other hand, the appearance of bans in the political communication field raises fundamental rights issues, in particular with regard to the freedom of expression. These prohibitions are thus measures that are conscious of their political background and, as such, also represent a kind of reassessment of symbolism at a given time. After all, the new democracies of the Eastern and Central European political regimes are turning to this problem even after a generation, with new regulatory results. In its historicity, this also marks the career path of totalitarian symbols: both in contemporary political struggles and in certain social processes, providing a reasonable set of communications. András Koltay states it in his criticism of the ECtHR ruling in the Vajnai case, which operates on an argument based on the ambiguity of symbols:

*'As to the statement that the red star has multiple meanings, it is not necessarily the case in Hungary. ... The red star rather reminds the victims of the regime and people familiar with the history of the falling of the red star from public buildings in the rebellion of October 1956 and during 1989 and not the struggle for equal suffrage of the Western European left-wing movements. This symbolic act did not mean the rejection of left-wing ideologies but embodied the insatiable desire for the abolition of the hated totalitarian regime. In other words, the red star may have a different meaning in Hungary, Lithuania, Cambodia and France or Italy'<sup>10</sup>.*

However, we are now interested in the specifics of the conflicts of fundamental rights, interpretation and argumentation on the meaning(s) of symbols. These are reviewed below, touching on different areas of law and looking at several European legal systems.

## II. ON CRIMINAL LAW INSTRUMENTS

### 1. Standards?

The European consensus on the fight against totalitarian regimes and their symbols may be found in several documents. The Council of Europe action on Nazi and Fascist totalitarianism in the second half of the twentieth century was more in the context of combating racism and xenophobia<sup>11</sup>. This was followed later by a more marked stance against the legacy of the Communist regimes. However, the Venice Commission is beginning to outline European standards for action against symbols of Communist

<sup>9</sup> TEITEL, Ruti G.: *Transitional Justice*. New York, Oxford University Press, 2000. pp. 71, 116.

<sup>10</sup> KOLTAY, András: "A vajnai-ügy Az Emberi Jogok Európai Bíróságának ítélete a vörös csillag viselésének büntethetőségéről. (The Vajnai case The European Court of Human Rights and the criminality of the red star)" *JeMa* 2010/1., p. 79.

<sup>11</sup> See: ECRI General Policy Recommendations No. 1 (1996) and No. 15.

regimes (ECtHR case law) from the Vajnai case.<sup>12</sup> The European Court of Human Rights has based its initial position on Article 17 of the Convention in the case of some right-wing propagators; the Court had observed that “the general purpose of Article 17 is to prevent totalitarian groups from exploiting in their own interests the principles enunciated by the Convention”<sup>13</sup>.

The European Union's resolutions against totalitarian regimes also converge on a similar basis. The Framework Decision (FD) against racism and xenophobia among EU policies<sup>14</sup> provides for the suppression of certain conduct by means of criminal sanctions, which Member States must include in their criminal code. Member States may choose to punish only conduct that is liable to disturb public order or is threatening, abusive or insulting. It is interesting that the FD does not refer explicitly to symbols of totalitarianism and their prohibition. In Hungarian law, there are further statutory elements that are compatible with the decision; similarly, Romania extends its anti-racism legislation to symbols in its Act No. 217/2015<sup>15</sup>.

The Venice Commission addressed this issue further in an *amicus curiae* made in a constitutional court case concerning political party regulation in Moldova<sup>16</sup>. (CDL-AD(2013)004-e) According to the Commission, the prohibition of the symbols in question is almost necessarily contrary to the freedoms of expression and of association, and the protection of these key values calls for a careful examination of the admissibility of the measures. In terms of the standard of being determined by the law, states' regulatory solutions may be grouped according to whether the symbols are specifically named (such as in Hungary) or referred to in less acceptable non-explicit terms (such as “totalitarian Communist symbols” as the proposed Moldavian solution). Similarly, the reference to “spreading totalitarian ideologies” is not precise enough. Indeed, the terms “ideology” and “totalitarian” are not sufficiently clear, as the Commission and the previous decisions of the Polish and Czech Constitutional Courts have upheld. The legitimacy of the objectives underlying the ban may be supported by several interests. The overwhelming social need for some of these bans may be justified by the protection of democracy (although the ban on anti-system parties requires a more chiselled approach), preventing violations of the rights of others and the disturbance of public peace. The Venice Commission, citing the court arguments in *Vajnai case*, emphasises that the possibility of promoting a totalitarian ideology is not a sufficient reason for prohibiting symbols, especially if they have a multiple meaning.

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<sup>12</sup> See: CDL-AD(2013)004-e [22-23.] See also: PACE Resolution 1096 (1996) and PACE Resolution 1481 (2006).

<sup>13</sup> Vajnai v Hungary, 2008. [21.].

<sup>14</sup> Council Framework Decision 2008/913/JHA of 28 November 2008 on Combating Certain Forms and Expression of Racism and Xenophobia by Means of Criminal Law.

<sup>15</sup> For the results of the national transposition of the Framework Decision on Racism see: <https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=celex:32008F0913>

<sup>16</sup> After reviewing European standards, the Commission takes examples from each national legal system and then analyses Moldova's regulations.

We may establish that the justification for the prohibition of totalitarian symbols is part of the discourse that includes the suppression of extremist, racist and hate speech, and partly the condemnation of totalitarian regimes and the prevention of their return. Within this more general framework, the specific objectives of protecting the rights of individuals and public peace/order are mentioned.

## 2. Central European Solutions (?)

Reviewing the otherwise diverse criminal law elements of Central European states, statutory elements related to totalitarian regimes are generally explicit, but totalitarian symbols appear less frequently. The following overview<sup>17</sup> focuses on the more specific statutory elements, compared to hate crimes, related to the prohibition of symbols.

Article 86 of the German *Strafgesetzbuch*, which withstood the constitutional control, prohibits the dissemination of propaganda material of unconstitutional organisations. Such organisations include, *inter alia*, political parties disbanded as a result of unconstitutional activity, but also propaganda materials supporting the aims of National Socialist organisations are prohibited. This propaganda material fulfils the statutory elements if it “is directed against the free, democratic constitutional order or the idea of the comity of nations” (Art. 86 (2)). Distribution for educational and cultural purposes does not constitute a crime. Article 86a further punishes the distribution, public use, production of, and trade in symbols of such organisations<sup>18</sup>. Article 86a (2) specifies the range of symbols: flags, badges, uniforms, parts thereof, slogans and forms of greetings, even if the symbols used are confusingly similar<sup>19</sup>.

In *Nix v Germany* (2018) the ECtHR declared that “the historical experience of Germany is a weighty factor to be taken into account” when the limitation of freedom of expression is considered. “In the light of their historical role and experience, States which have experienced the Nazi horrors may be regarded as having a special moral responsibility to distance themselves from the mass atrocities perpetrated by the Nazis”. With that background, the Court accepted the paradigm of German legal system:

*“it is not necessary, given the purpose of Article 86a of the Criminal Code, for the use of a symbol to fall within the provision’s scope, that there be proof that the symbol was used to support anti-constitutional objectives, that the use has to be understood as supporting the objectives of the prohibited organisation, or*

<sup>17</sup> A comparative overview is also provided in Hungarian Constitutional Court Decision No. 4/2013. (II. 21.) [24-44.].

<sup>18</sup> STEGBAUER, A. “The Ban of Right-Wing Extremist Symbols According to Section 86a of the German Criminal Code”. *German Law Journal*, 2007, 8(2) pp. 173-184.

<sup>19</sup> In Germany, a ban on Nazi symbols was applied to war and other gaming software, but this resulted in programs that created symbols very similar to the original ones. See: BBC: “Germany lifts total ban on Nazi symbols in video games”. (August 2018), <https://www.bbc.com/news/world-europe-45142651>



*that the use constituted a concrete threat to constitutional democracy. The provision bans such symbols, as a rule, from German political life and establishes a »communicative taboo«<sup>20</sup>.*

So –despite displaying the picture of Himmler, the swastika and the uniform of the SS without the aim of propagating the Nazi propaganda– the limitation of the applicant’s right to freedom of expression has not violated the Convention; the Court did not analyse the meaning layers and the context of the expression.

The Criminal Code of Latvia (Article 74) orders the sanctioning of any denial or glorification of crimes against humanity committed by Nazi Germany and the Soviet Union as crimes against humanity and peace, as well as the act of Lithuania (Article 170), while pursuant to Article 188(18) of the Lithuanian Offences Act, the distribution of totalitarian symbols, their use in public rallies and at mass events is punishable. Such is a flag, symbol or flag/symbol or uniform, which includes the flag of Nazi Germany, the Soviet Union, the Lithuanian Soviet Socialist Republic; and symbols or uniforms of Nazi or Communist organisations, the “Nazi swastika”, the Nazi SS badge, the Soviet hammer and sickle and symbols based on “Soviet five-pointed red star”. Pictures of German Nazi and Soviet Communist party leaders responsible for the repression of Lithuanian citizens, as well as singing the national anthems of Nazi Germany, the Soviet Union and the Lithuanian Soviet Socialist Republic are also subject to the ban<sup>21</sup>.

Article 13 of the Polish Constitution provides the backdrop to the struggle against the legacy of totalitarian regimes, and forbids the organisation and operation of political parties based on totalitarianism and organised under Nazi, Fascist or Communist principles. Article 256 of the Penal Code punishes anyone who promotes a fascist or other totalitarian state system, and the use of totalitarian (Nazi, Communist, or other totalitarian) symbols is also punishable if this is done to support totalitarian regimes. According to the Polish Constitutional Court<sup>22</sup>, the effort to prohibit the use of symbols failed, as their dangerousness to society is doubtful, and the statutory elements were not sufficiently precise in specifying the symbols.

The Czechoslovak Constitutional Court has further ruled on the 1991 amendment of the Czechoslovak Criminal Code that a ban is not unconstitutional if the expression is capable of depriving citizens of their rights and incitement to hatred; however, the reference to communism is not precise enough, as it may refer to the punitive ideology of a violent acquisition of power and proletarian dictatorship, as well as to objectives that may not be classified as such (such as a classless society, etc.). As a result of this resolution, the terms “fascism” and “communism” were removed from the law. (CDL-AD(2013)004-e [33-34.]). The Slovak Criminal Code, on the one hand, orders that support for groups and movements that use violence or threat of violence or seriously hurt others with the aim of suppressing the fundamental rights and freedoms of

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<sup>20</sup> Nix v Germany (2018) 56, 47, 31.

<sup>21</sup> BITIUKOVA, N.: *Hate Speech in Lithuania*. (2013) [http://hrmi.lt/wp-content/uploads/2016/08/Neapykantos\\_kurstymas\\_EN.pdf](http://hrmi.lt/wp-content/uploads/2016/08/Neapykantos_kurstymas_EN.pdf)

<sup>22</sup> Res. K 11/10, July 2011.

citizens be punished. (Article 421) Subsequently, the act (Articles 422-422c) classifies a person's public expression of his/her commitment to such organisations, “in particular by using flags, badges, uniforms and slogans” as a crime. It is also a crime to produce, distribute and possess such extremist goods. (Article 422c).

In Romania, Act No. 217/2015 ordered the prohibition of fascist, racist or xenophobic organisations and symbols and the cult of persons guilty of crimes against peace and humanity. This act contains specific definitions for the Iron Guard and the Romanian Holocaust, but its critics have said that the reference to the crimes of communism is still left out<sup>23</sup>.

Russia's Criminal Code (Article 282) prohibits the establishment of extremist organisations and, on the other hand, the prohibition of extremist (primarily Nazi) symbols in the Offences Act (Article 20.3). It imposes sanctions on the public use and promotion of Nazi tools, symbols, or props (according to the commentary<sup>24</sup>, this includes the use of objects, words and gestures used by the German National Socialist Party and the Italian Fascist Party in public places, and includes the promotion, production, sale or acquisition thereof), as well as such symbols of extremist organisations.

The ECtHR, *contrary to the Nix v Germany case*, recently found that Russian courts did not try to assess all the relevant aspects in *Karatayev v. Russia* (2021). In 2007 a newspaper featured an editorial publication entitled “In Defence of Swastika” («В защиту свастики»), which concerned a public awareness campaign run by Hindu organisations in Europe aimed to exonerate the swastika symbol. The article included the symbol itself, one of the images “was a fragment of nineteenth century gold embroidery from the Vologda region in Russia containing swastika”. [par. 5-6.] The ECtHR argues that the Russian law at that time generally prohibited any use of Nazi or other symbols similar to them to the point of becoming indistinguishable. (...) in the present case the domestic courts ... failed to carry out a contextual assessment as to whether the article or the accompanying images could be seen either as promoting an extremist ideology or otherwise lead to harmful consequences”. “The Court observes that the Russian law at the time –at least as interpreted and applied in the applicant’s case– did not appear to leave room for any lawful use of such symbols even when it was meant, for instance, to report on current events or to combat unconstitutional movements (contrast *Nix v. Germany*)” [par. 23-24.].

<sup>23</sup> RĂILEANU, R. et al., R. et al.: *Annual Report on Hate Speech in Romania 2015–2016*. Netrangers - ActiveWatch, Bucharest, 2017. Available at: <https://fra.europa.eu/en/databases/anti-muslim-hatred/node/6387>

<sup>24</sup> YUDINA, N. *Countering or Imitation: The state against the promotion of hate and the political activity of nationalists in Russia in 2017*. (2018) Available at: [https://www.sova-center.ru/en/xenophobia/reports-analyses/2018/03/d39029/#\\_ftnref27](https://www.sova-center.ru/en/xenophobia/reports-analyses/2018/03/d39029/#_ftnref27)

### 3. Turns in the Hungarian regulations and Constitutional Court case law

The history of the ban on totalitarian symbols in Hungary contains several exciting episodes, including two different Constitutional Court rulings, several ECtHR judgments, and criminal law and turns of other branches of legal regulations. At this point, we will examine court arguments on criminal law statutory elements.

#### 3.1. New impulses for criminal legislation against totalitarian regimes

By 2010, the responses of the Hungarian legal system to the challenges of totalitarian ideas may be characterised by a roughly clear formula: hate speech is punishable if the offending behaviour has reached the threshold of incitement, and the Constitutional Court (CC) has repeatedly overturned legislative efforts to extend it. The reasons for this were both the use of vague concepts and the inadequacy of the reference to (distant) harm to public peace. Symbols of totalitarian regimes are ordered to be punished by the Criminal Code in a manner that is accepted by the CC and the *Vajnai case* did not bring about any particular change in the legal order for a while. From 2010 onwards, symbolism related legislation gained a new momentum. Three incentives may be mentioned for this:

- *the EU Framework Decision on Racism* came into force in 2009 and the Commission requested reports on specific developments with a short deadline (first steps were made by incorporating the Holocaust denial into the penal code),
- *the new Fundamental Law* was a major innovation in terms of its value content, including, *inter alia*, the self-determination against totalitarian regimes that is performed in the preamble, markedly delineating the constitutional and dictatorial period of Hungarian history, and the new Article U inserted by the Fourth Amendment adds a further lengthy criticism against the totalitarian party of the Communist regime and its “power holders”. This new context, by comparison with the Constitution, expresses, in any event, that the promotion of the ideology of totalitarian regimes constitutes the denial of the current constitutional set of (democratic) values.
- *Strasbourg's expectations* have become more demanding: in new cases, similar to the *Vajnai case*<sup>25</sup>, the ECtHR condemnation on the five-pointed red star had already affected the Constitutional Court.

The constitutionality of the statutory elements of ‘Holocaust denial’ was established by the Constitutional Court. In CC decision No. 16/2013. (VI. 20.) it argued that “[50.] ... denying the sins of Nazism and Communism shall be considered as abuse of freedom of expression, which severely injures not only the dignity of the community of victims but the dignity of citizens committed to democratic values and identifying with or sympathising with the victims. The protection of the dignity of victims’ relatives and persons sympathising with victims makes it possible and/or necessary to

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<sup>25</sup> *Fratano v. Hungary* (2011), *Fáber v. Hungary* (2012).

foresee a criminal sanction imposed in the event of [such] an act ... [52.] ... stating publicly an opinion contrary to general social convictions, opinions that violate the sense of justice and the dignity of the victims may also be capable of provoking public outrage and offending others, which may lead to disruption of public peace". It should be noted that the dissenting judges did not accept either the equal treatment of the crimes of National Socialism and Communism (P. Kovács), the concern for the dignity of individuals or communities (A. Bragyova), or the violation of public peace (M. Lévay).

To judge it in connection with the freedom of expression, we may start from the content-neutral protection that the Court had formulated early on, which has in many cases been weakened by exceptions, such as the prohibition of the totalitarian symbols analysed below and the protection of national symbols. In these cases, the Court brought in the values to be protected "from afar": constitutional values, historical experience and the dignity of certain groups and communities. However, while in the case of incitement it has set a clear criterion for the violation of public peace, the direct and obvious danger, in this case, neither the direct threat to public peace nor the actual harm to the human dignity of certain persons or groups is demonstrated. Of course, the denial of the crimes of totalitarian regimes is a manifestation of extremist political tendencies that threaten the constitutional order, and the public peace based on it. The dissemination of these ideologies denies the above-mentioned fundamental values of the Fundamental Law, in which sense the constitutional basis of the statutory elements appears already to be more acceptable.

### **3.2. The specific prohibition: the use of the totalitarian symbol (Criminal Code, Section 335)**

Since 1993, the Hungarian Criminal Code has, with some exceptions, ordered punishment for the use of the following symbols in public: the swastika, the SS badge, the arrow cross, the hammer and sickle and the five-pointed red star. The criminal law prohibiting the use of totalitarian symbols was found to be constitutional in 2000, but was not uniformly applied by ordinary courts, particularly following the ruling of the Strasbourg Court (ECtHR) in the Vajnai case and in terms of their danger to society.

In 2000, the Constitutional Court considered that freedom of opinion could be restricted if it was "necessary in a democratic society" (relying on the European Convention on Human Rights). In considering this necessity, the constitutional values (democracy, the rule of law, equal dignity of all) and the historical context were taken into account.

*"The unrestricted, public, free use of the symbols in question in this historical situation is gravely offensive to any respectful person who condemns the ideas of hate and aggression and is committed to the values of democracy, and in particular is offensive to those persecuted under Nazism and Communism. In Hungary, the memory of both ideas, which are concentrated in the forbidden symbols, is alive in the public consciousness and in the communities of survivors of persecutions, and all sins committed during the use of such symbols: these are*

*not forgotten. People who suffered grievous harm and their relatives live among us*<sup>26</sup>.

In his dissenting, Judge Kukorelli emphasised that it is precisely because of the historical situation and the close remembrance of the period when free speech was taboo that free political discourse should be guaranteed. “Nowhere has it been possible to curb the spread of totalitarian ideas by restricting freedom of expression, and where anti-democratic forces have come to power, it was not the freedom of opinion that helped them to reign”. In his view, the statutory elements fail the test of content-neutral protection, as well as the desire to determine the risk of the specific harm to the freedom of opinion (disturbance of public peace is not enough in itself).

The issue of totalitarian symbols has been advanced by an individual complaint to the ECtHR concerning the wearing of a five-pointed red star (*Vajnai v. Hungary*, 2008). The ECtHR stated that, in the absence of a strong democratic social need, there is no justification for a general sanctioning for the use of the symbol. The Court recognised that communism had wounded Hungary and Europe deeply, and that the symbols of totalitarian regimes cause discomfort to the victims. However, this historical experience becomes relative. The danger of rebuilding the Communist system is unrealistic.

*“Given the well-known assurances which the Republic of Hungary provided legally, morally and materially to the victims of communism, such emotions cannot be regarded as rational fears. In the Court’s view, a legal system which applies restrictions on human rights in order to satisfy the dictates of public feeling –real or imaginary– cannot be regarded as meeting the pressing social needs recognised in a democratic society, since that society must remain reasonable in its judgement. To hold otherwise would mean that freedom of speech and opinion is subjected to the heckler’s veto”*<sup>27</sup>.

However, some courts in Hungary, since the Parliament has not amended or abolished the criminal regulation, kept on punishing. The issue arrived “back” at the Constitutional Court in 2012 through an individual constitutional complaint. CC. Decision No. 4/2013 (II.21.) has annulled all the statutory elements, not only with regard to the red star.

The CC wished to depart from its previous precedent and, with a new line of argumentation, began to examine the facts (it had not regarded the case as *res iudicata*, since the Vajnai case resulted in a “legally significant new circumstance”). The CC considers it

*“a legitimate objective for the legislature to prohibit, by means of criminal law, behaviours which are contrary to these principles in the protection of human dignity and constitutional order or values. However, the legislator must ensure that a legal instrument operates subject to a precise definition and safeguards against arbitrary application of the law if the legal instrument entails*

<sup>26</sup> CC. Decision 14/2000 (V.12.).

<sup>27</sup> Vajnai v. Hungary 2008, [57.].

*restrictions of fundamental rights. ... the Criminal Code gives too broad definition of the range of punishable behaviours, as it fails to differentiate, but generally orders the sanctioning of the use of symbols, although it may be necessary to take into account the purpose, the mode of perpetration and the result triggered for each symbol. The general criminalisation of the use of symbols leads to the punishment of conduct, the criminalisation of which disproportionately restricts freedom of expression. ... Vagueness, which raises concerns in terms of legal certainty, appears in the possibility of arbitrary interpretation and application of law”.*

The Constitutional Court therefore ordered that criminalisation be defined in a narrower –more precise– range. From the arguments described above, it follows from the Hungarian regulations that, a ban on the use of totalitarian symbols may be justified but the prohibition must not be total, and the sanctioning of their public use alone disproportionately violates freedom of opinion. For the latter purpose, circumstances capable of clarifying the prohibition should be reflected in the criminal law statutory elements. Possible clarifying circumstances include direct and flagrant violation of public peace, specific violation of human rights and proclamation of and identification with totalitarian ideologies against democratic constitutional values by the perpetrator. The Parliament finally has refined the ban by describing the manner in which it was committed: any person who disseminates, uses in public, or publishes the relevant symbols “in a manner capable of disturbing public peace, in particular in a manner that violates the human dignity or right to respect of the deceased of the victims of totalitarian regimes” may be punished. The legislator made it clear in that dialogue that the “lifting of the ban was not timely and was contrary to human dignity as defined by the Fundamental Law, as long as there was a living person in Hungary tortured by those wearing the symbols of such dictatorships. The most horrible time of the 20th century must not be lost to oblivion...”<sup>28</sup>.

The new statutory element is only partially more reassuring. On the one hand, the manner capable of disturbing the public peace provides a slightly clearer basis for the jurisprudence to determine the danger to society and assess criminal liability. It is likely that a “*clear and present danger*” test may be expected to be introduced in court judgments, which may result in an extremely narrow range of punishable behaviours, despite the legislator's intention. On the other hand, the Criminal Code offers an example of the mode of committing the crime, the violation of the human dignity of victims. Unfortunately, this is not an exact benchmark<sup>29</sup>. The viewpoint that the use of these symbols *eo ipso* constitutes a violation of human dignity and the right to respect for the deceased (as is otherwise indicated in the statement of reasons to the bill) would reinstate the earlier cause for annulment.

One particular circumstance is worth mentioning. I refer back to the fact that some countries attempting to restrict symbolic political speech sanctioned where the

<sup>28</sup> Statement of reasons to Bill No. T/10592.

<sup>29</sup> TÖRÖK, Bernát: *A szólásszabadság magyar doktrínája az amerikai jogirodalom tükrében (Hungarian doctrine of freedom of expression in the light of American legal literature)*. Doctoral dissertation, SZTE ÁJK. p. 118.

perpetrator's intention was to spread totalitarian ideas by using totalitarian symbols, and his identification with such ideas may be tested with regard to the manner of commission. However, as the Venice Commission argues, the term “totalitarian ideologies” is not sufficiently clear either. The scope and content of such ideologies is too diversified (for example, let's consider some of the historical philosophical statements of Marxism), so that their total punishment would disproportionately harm the fundamental right to freedom of expression<sup>30</sup>.

It may be argued that by introducing new ways of committing the offence into the statutory elements prohibiting the use of totalitarian symbols, Section 335 is very close to the statutory elements of incitement against a community, which is also meant to protect public peace. In fact, one of the content elements of hate speech or incitement appears here (through incitement behaviour symbols). Section 335 is only applicable when “no more serious crime is committed” and, for the above reasons, we may expect that incitement to hatred, as a more serious crime (punishable by a term of up to three years' imprisonment) will absorb these statutory elements (its offender is punishable by confinement for a misdemeanour). Courts in Hungary have rarely established the existence of incitement so far, and it is likely that these renewed statutory elements will not “spread” in the case law. However, the Budapest Court of Appeal in 2015 found that the ideological identification with authoritarian regimes (ie. the intention to promote the swastika and to spread Nazi ideology!) is the precondition of the violation of rights of victims of totalitarian regimes<sup>31</sup>.

### III. NEW FRONT-LINES: IN OTHER BRANCHES OF LAW...

#### 1. Name choices that may be associated with totalitarian regimes

The legislature in Hungary does not restrict the fight against totalitarian regimes and their symbols to criminal law measures. It may be noted that, in 2000, the Constitutional Court held that against conducts using totalitarian symbols, “in the present historical situation, no other legal instrument is available in addition to the tools of criminal law and sanction for effective protection (*ultima ratio*)”<sup>32</sup>. After the adoption of the new Fundamental Law of Hungary, however, the “tools” available in other branches of law, have multiplied. We may refer here to the Civil Code provisions on hate speech and the protection of community dignity, but also other acts (for ex. Act CLXVII of 2012) that affect the right of association, the formation of companies, media products, and the powers of local governments to name public spaces.

A common element of statutory constructions is the restriction of the use of certain names and expressions, namely: the name of a person who played a leading role in the foundation or maintenance of any of the totalitarian political regimes, or any expression that can be directly associated with an authoritarian political regime.

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<sup>30</sup> CDL-AD(2013)004-e, pp. 74-78.

<sup>31</sup> The Court did not established the crime in case the online sale of a wine speciality called “Führerwein” and decorated with symbols of the Nazi regime [Case nr. 3.Bhar.51/2015/9].

<sup>32</sup> Decision 14/2000. (V. 12.), IV.5.

Specifically, the law introduces a procedure whereby it is “required to obtain the position of the Hungarian Academy of Sciences (HAS) in case of doubt”, because compliance with the provision –in terms of roles and relationships in political regimes– may require historical analysis and evaluation. The construction is specific compared to the earlier ones in the fact that the restriction of symbolic use of words may not be based solely on the “public opinion” of totalitarian regimes. Although the law enforcers may have their own views on the links of the bearer of a name or of a particular term to a totalitarian regime, in this case “doubt” may arise on the part of the “client” and be enforced in some form of redress procedure<sup>33</sup>.

The HAS issued a general statement, and gave qualifying opinions on cases (names, phrases) initiated by the stakeholders in case of designation of public spaces. “In the case of a natural person, the HAS shall not examine the scientific, artistic, scientific or artistic work, performance or significance of the person concerned, but shall deal only with the matter imposed on it by the act”<sup>34</sup>. We are now in a broader interpretation of the symbolism of totalitarianism, yet we get specific answers from the HAS, that (for example, regarding some controversies in Hungarian public opinion):

In the case of Cécile Tormay:

*“... She proudly declared herself anti-Semitic and fascist, and never withdrew her views. ... it is indisputable that, as an ideologue and propagator, she played a role in building the intellectual background and social embeddedness of the later totalitarian regime. As the law fails to restrict participation in the establishment of the totalitarian regime to participation as decision-makers or executives, the designation of the public domain from Cécile Tormay is, in our opinion, is within the scope of the ban ... Cécile Tormay's career as a writer was undoubtedly promising, but after her political appearance he could no longer reach the artistic standard of her early works. Her recognition was more due to her public role”.*

- In the case of Karl Marx

*“Although ... “vulgar Marxism” became a state ideology in the Communist dictatorship: Marx's intellectual performance in itself is highly valued by universal cultural history. As a result, dozens of public spaces in today's Germany (...), France and Italy are named after him. However, these are all areas where no attempt has been made to put his teachings into practice. In Hungary, however, we do not recommend using his name for a public space, as Marxism-Leninism is strongly associated with the Soviet type of totalitarian regime”.*

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<sup>33</sup> The law introduces this rule for the use of names: into the company registration procedure (Act V of 2006) with regard to naming companies; the registration procedure for press products and media services (Act CLXXXV of 2010); with regard to the designation of NGOs (Act CLXXXI of 2011), which applies not only to associations but also to political parties; the designation of public spaces and public institutions (Act CLXXXIX of 2011) for local governments. It is interesting that it is not inserted in the Act on the Protection of Trademarks.

<sup>34</sup> HAS, 2012.



- In the case of 1 May

*“In 1891, the Second International... officially declared May 1 as a public holiday. It is primarily a social democratic holiday, but since 1955, on the basis of the ordinance of Pope Pius, it is also a Catholic feast... Although it was one of the celebrations of the Communist dictatorship, in many countries today, including Hungary, it is a holiday from work, a public holiday. The term does not directly refer to the totalitarian political regime of the 20th century and is therefore usable”.*

- In the case of Albert Wass

*“Evidences brought against him by the Romanian people's court proved to be highly doubtful in the light of historical research. The Hungarian state restored the citizenship of Albert Wass in his lifetime, his work has been acknowledged with a high state award. Many public spaces and public institutions has been named after him throughout the country, a number of sculptures and monuments evoke its shape, its works are available in large numbers ..., and some of his works have been included in the National Curriculum... The legal and moral rehabilitation of Albert Wass can be considered complete in Hungary, so his name cannot in any way fall within the scope of the law”.*

From the case law of the regulations, there is the case of a dispute between a local government and the Government Office exercising the legal supervision. According to this, the Government Office objected that the municipality did not change the name of *Lajos Fekete* street, despite the fact that the said resolution of the Academy stated that Lajos Fekete had died with the aim of protecting the totalitarian regime. The local government, however, did not agree with the HAS's statement, but finally the Curia of Hungary, ordered the local government to rename the public space, because in its opinion the HAS's position is binding: “local governments (as part of the state organisation) are not entitled to decide on scientific truths...”<sup>35</sup>.

As things stand, there are two remarks to be made here. The Academy's position seems also legally conclusive. This is somewhat confusing where the resolution itself contains no clear conclusion; see the case of *Cécile Tormay*. However, we must not forget the plural meaning of names. Although the name of Karl Marx is less frequent, but in rather common cases, such as that of Lajos Fekete, it could lead to a puzzling situation. Finally, in certain cases the argumentation of the Academy is based on *later* developments (like in case of A. Wass) and not on the historical evaluation of the person's role.

## 2. Commercialisation of totalitarian symbols

The case referred by the public as *Lex Heineken* highlights the earlier thwarting of the prohibition of symbols set out in Section 269/B of the former Criminal Code, which foresees a comprehensive penalty, irrespective of the context (with some educational, etc. exceptions). It is the use of the five-pointed red star, but for which it was common

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<sup>35</sup> Case No. Kfv.IV.37.374/2015/3.

that no criminal proceedings followed. Issues included, but were not limited to, the ‘commercial’ logo and branding of a beer brand and a sporting goods (shoes) brand.

According to the bill T/14441. on the prohibition of the use of totalitarian symbols for commercial purposes submitted to the Hungarian Parliament in 2017, “It is forbidden in Hungary for the swastika, an SS badge, an arrow cross, a hammer and sickle, a five-pointed red star or a symbol depicting them (hereinafter: “totalitarian symbol”) to be (a) used, (b) displayed or (c) for goods or services bearing such a totalitarian symbol to be sold. The prohibition shall not apply to the use, presentation or sale of educational, scientific and artistic representations of historical events...”. The Government may, by individual decision, grant an exemption, in whole or in part, from the prohibition. The statement of reasons to the bill mentions that the Parliament was forced by the Vajnai case, but

*“nothing, however, governs the phenomenon that the display of totalitarian symbols for commercial purposes and thus bringing along their sneaky social acceptance constitutes a kind of legitimacy to the earlier set of symbols of dictatorships. At the same time, this is undesirable and, in fact, highly detrimental to the collective social memory. ... [The legislature seeks to counteract this by sanctioning it] in order to protect public order and morals”<sup>36</sup>.*

Otherwise, the European Commission has examined the proposal because of the impact on the EU market and has not vetoed it. As it emphasised, “it is committed to ensuring that the crimes committed by totalitarian regimes are never forgotten in Europe”<sup>37</sup>.

In addition, court proceedings have been initiated against the red star’s presence in commerce in Hungary. In 2017, the applicant stated in his petition that he “declared himself to be of Hungarian nationality”; he stated that the five-pointed red star used by the defendant was a symbol of Communist dictatorship, causing severe trauma to the entire Hungarian nation. According to the applicant, he and his family were persecuted by Communism, and have been struggling to preserve the victims' memory and banish the symbols of dictatorship from public life since the change of regime. The plaintiff relied on the personality protection clauses of Civil Code (2:54) as the legal basis for his claim, but the court sums it up briefly by establishing that the applicant was not able to prove his personal involvement. There is, however, a strong argument at first instance concerning the symbol:

*“According to the court, the illegitimate nature of the use of the five-pointed red star would have been different if it was given a political meaning, even indirectly, by being linked to Communist totalitarian reign. In this case, such a symbol would indeed be detrimental to a community that suffered from the totalitarian*

<sup>36</sup> <http://www.parlament.hu/irom40/14441/14441.pdf>

<sup>37</sup> SZABÓ, Zsuzsanna: “Tovább csúszhat a lex Heineken” (Lex Heineken could be delayed further.) *Napi.hu*, 19.06.2017 <https://www.napi.hu/magyar-gazdasag/tovabb-csuszhat-a-lex-heineken.641791.html>

*power. In the absence of this, however, the use of Heineken's five-pointed red star causes no harm*"<sup>38</sup>.

Hence, the Court has embraced –without ignoring the criminal law– the view that there are *various contexts* in which totalitarian symbols may be used as a symbol without being connected to the totalitarian regime or the dignity of the victims/descendants.

#### IV. LESSONS LEARNED

With regard to the interpretation and argumentation concerning the symbols of totalitarian regimes and their prohibition, the following lessons are given in this overview.

1. The political importance of reflecting on totalitarian regimes in the Central European legal systems has not diminished since the change of regime. Due to social phenomena (extremist movements, etc.), it is likely that one will need to wait for it for a long time. In such an environment –European– legal systems do not lose sight of the goal of protecting current democratic systems from being rearranged or of negative traditions being preserved.
2. Legal instruments are largely available against extreme manifestations, the necessity test of which may be justified by the values of both protecting public peace and human dignity. Various symbols of totalitarian regimes may also be sanctioned if they appear (as evidence or the means of the offence) in this extremity.
3. It is more interesting to consider legal provisions that explicitly name and prohibit explicit symbols. These provisions create a challenge in interpretative argumentation, in which attitudes towards the historical past and social collective consciousness may be important: not only an individual infringement of rights requires justification, but also the unambiguous decoding of a given symbol.
4. National legal systems and jurisprudence may partly contribute to the decoding of symbols. Symbols appropriated by totalitarian regimes may have a specific past or concurrent meaning; according to this, we may distinguish between them (e.g., the hammer and sickle has less of an etymological layer of interpretation than the red star).
5. Judgments may still be subject to the assessment of the dangerousness to society of the use of a symbol and the particular context of communication (use of a symbol). In any case, it may be seen from most of the judiciary's arguments that, if there is to be a sufficiently strong social need to justify against the

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<sup>38</sup> Győr Regional Court, Case No. P.20.112/2018/8.

privileged freedom of expression here, it will become increasingly difficult as time passes. However, besides the route opened in Vajnai case, recently the European Court of Human Rights argues still ambivalently, accepting a communicative taboo in a country and pondering the context of speech in another. It seems quite possible the Central European states, including Hungary will provide with more cases for challenging this balancing interpretation.

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