Towards Improved Law and Policy on ‘Hate Speech’—The ‘Clear and Present Danger’ Test in Hungary

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1. Introduction

There is a widely acknowledged view that the United States prohibition of content-based ‘hate speech’ laws is exceptional. Kevin Boyle writes about ‘the distinctive position of the United States’ in this matter, and Sandra Coliver phrases it as ‘the United States’ dramatically different approach from that of Europe and the rest of the world’, while she argues that a ‘number of lessons may be drawn from the US experience which may be applicable to other legal systems’. James Weinstein writes that the ‘American free speech doctrine is

1 I would like to thank John Harbord, Ivan Hare, Leslie Newman, Robert C. Post, Nadine Strossen, and James Weinstein for their especially helpful, detailed written comments on the drafts of this essay. I am also grateful to many other friends and colleagues who shared with me their insights on the regulation of ‘hate speech’, and to the Faculty of the Cardozo School of Law for the great opportunity to give a talk for them on the main points of this article and for their thoughtful questions and remarks following my lecture.

This article will analyse only the prohibition of ‘hate speech’ in the criminal law in Hungary without exploring the civil law or media law responses. For examples supporting the argument that a media-specific regulation is needed in the case of broadcasting insofar as it works differently from other forms of communication, see R. Gillette, ‘Kosovo: Media and the Riots of March 2004’, in S. Nikoltchev (ed.), Political Debate and the Role of the Media: The Fragility of Free Speech (Strasbourg: European Audiovisual Observatory, 2004), 101–3; I. Al-Marashi, ‘The Dynamics of Iraq’s Media: Ethno-Sectarian Violence, Political Islam, Public Advocacy, and Globalization’ (2007) 25 Cardozo Arts & Ent. L. J. 95, 113–8.

When used in legal parlance, the colloquial expression ‘hate speech’ seems to presuppose that the state can define with legal precision the particular forms of content that should be regulated as ‘hate speech’. Because I regard this implicit assumption as questionable, I shall use ‘hate speech’ only in quotation marks. I do not mean to imply that many clear instances of obvious ‘hate speech’ cannot be identified; I mean only to stress that a reliable definition of this term, if possible at all, cannot be taken for granted.


3 ‘Hate Speech Laws: Do They Work?’ in Striking a Balance (ibid.), 372.

4 Ibid., 372.
unique among democracies in forbidding even a narrow ban on racist speech’.\(^5\) Michel Rosenfeld notes the distinction, writing that, ‘In the United States, hate speech is given wide constitutional protection while under international human rights covenants and in other Western democracies,\(^6\) such as Canada, Germany, and the United Kingdom, it is largely prohibited and subjected to criminal sanctions.’\(^7\) Frederick Schauer writes that ‘American free speech exceptionalism is as manifest with respect to incitement to racial hatred and other forms of “hate speech” as it is with respect to libel and slander.’\(^8\)

The aim of this article is to highlight the relevant jurisprudence of Hungary, a post-Holocaust, post-communist, Central European democracy, and to show that the search for effective law and policy on ‘hate speech’ benefits from a fresh, open look at the best practices wherever they have developed.

Part 2 of this essay provides a short description of the social context in Hungary, the most important elements of which are: the Hungarian freedom struggles in the nineteenth and twentieth centuries which always passionately advocated freedom of speech and freedom of the press; decades of totalitarian censorship; the largest Jewish community remaining in Central Europe after the Holocaust, mostly concentrated in Budapest; antisemitism; and the hatred against Roma Hungarians. The prevailing argument was that adopting the American approach to ‘hate speech’ was the best possible choice; risky, but still the most prudent.

Part 3 analyses how the Hungarian Constitutional Court (‘the Constitutional Court’) and the other courts in Hungary have adopted the ‘clear and present danger test’ of the Supreme Court of the United States (‘the Supreme Court’).\(^9\) I show how the Constitutional Court laid down the constitutional interpretation of freedom of speech for the Republic of Hungary—referencing the ‘clear and present danger test’, but still permitting restrictions the Supreme Court would not tolerate—and how the Hungarian Supreme Court and the lower courts construe that interpretation in their decisions, narrowing it in ways that affirm the American approach. I examine cases where the ‘clear and present danger’ test has not been

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6 In addition to Canada, Germany, the United Kingdom, and the United States, Ronald Krotoszynski includes Japan in his comparative book on freedom of speech, but he also compares only established democracies. See The First Amendment in Cross-Cultural Perspective: A Comparative Legal Analysis of the Freedom of Speech (New York: New York UP, 2006).


8 ‘Media Law, Media Content, and American Exceptionalism’ in Political Debate and the Role of the Media (n. 1 above), 63.

applied properly and I also provide an example to show the effect of the exceptional criminal law ban on the public display of certain totalitarian symbols.

Finally, in light of related Hungarian jurisprudence, I explore what might be the most helpful policy on this issue, the most difficult of all questions of free speech theory.

2. The Social Context of ‘Hate Speech’ in Hungary

It is almost taken for granted that the tragic European history of the twentieth century triggers a more restrictive legal treatment of ‘hate speech’ than the history in the United States, although as Ronald Dworkin writes: ‘There is nothing like the Holocaust in American history, but slavery is bad enough.’ Instead of accepting arguable presumptions on the different cultural environments of alleged ‘hate speech’, a careful analysis of the social context is necessary in each country in order to find the best law and policy.

For the new, post-communist democracies of Central and Eastern Europe, still in transition, history provided a unique sense of freedom (including freedom of speech) derived from generations that experienced both dictatorship and democracy. But this perspective had to overcome the hardships of learning freedom, learning to organize one’s life, living in a free political community, and identifying with a nationwide community without exclusive nationalism. As András Sajó observes:

After all, racism and incitement to hatred against ethnic (national) groups (primarily but not exclusively minorities) present a major social and regulatory problem in the post-communist period. Extremist nationalist propaganda was often part of the self-assertion of nationalist political movements and often became part of the official government ideology. Extremist nationalist speech played a major role in the escalation of the Yugoslav conflict, contributing ultimately to genocide. Given the strong endorsement of nationalism by many political actors, including some governments, in many countries extremist speech, irrespective of the legal provisions, became socially normalized to an extent.

How can law and policy influence a socio-cultural environment where ‘extremist speech, irrespective of the legal provisions, became socially normalized to an extent’? Is there any chance that a ‘hate speech’ law can accomplish its desired impact under such circumstances? Can the criminal prohibition of ‘hate speech’ work in the absence of social consensus against such communication? Can criminal prohibition educate a society; can it help create and strengthen basic

10 For different approaches to ‘hate speech’, see Striking a Balance in n. 2 above; Words & Deeds: Incitement, Hate Speech & the Right to Free Expression (London: Index on Censorship, 2005).
moral values including a clear rejection of racism? Is it not ersatz displacement instead of focusing on what the educational-cultural institutions and organizations could do to change the deeply rooted prejudices of many families? On the other hand, how can such countries avoid abusing laws on hate/extremist speech to suppress political dissent? An example of misusing such laws is the Russian statute ‘On countering extremist activity’, enacted in 2002, and amended in 2006. Andrei Richter writes:

According to analysts, the main idea behind the changes was to shield the authorities from discontent. Extremism now included spreading material that explained or justified it, disseminating public calls to engage in it and also promoting or facilitating it through the media. Publicly defaming state officials by maliciously accusing them of committing acts of an extremist nature also became an act of extremism.13

Most former communist states in Central and Eastern Europe regulate ‘hate speech’ on the basis of its content. Some of the post-communist countries, post-Soviet states such as Russia, Estonia and Lithuania, the post-Yugoslav republics, and Romania, incorporated the prohibition of incitement to hatred in their constitution.14 Emerging nationalist, ethnic, and religious conflicts after the fall of the communist regime that suppressed different groups certainly played a part in establishing bans on ‘hate speech’ at the constitutional level.

Hungary, after several suppressive regimes,15 took the opposite road, reflecting a deep distrust of government regulation of public discourse and the dangers of content-based restrictions of speech. The explanation for this choice by a Central European, post-Holocaust, post-communist country, in the words of Kevin Boyle, ‘must include its history as a society born in rebellion against, among other things, censorship’.16 Boyle wrote this as part of his ‘explanations for the distinctive position of the United States’ on the ‘hate speech’ issue. Yet, the same sentence describes the historical background of free speech jurisprudence in Hungary. Demanding the right to freedom of speech and freedom of the press was at the forefront not only during the non-violent, negotiated transition from communism to democracy17 (in the phrase of Vaclav Havel, the ‘velvet revolution’ of 1989), but also in a chain of earlier revolutions in Hungary.

13 Post-Soviet Perspective on Censorship and Freedom of the Media (Moscow: UNESCO, 2007), 227. 14 See n. 12 above, 128–32. 15 The political leaders of Hungary allied with Nazi Germany and in March 1944, German troops occupied the country. The Soviet army liberated Hungary, but the liberation turned to another suppression. As Peter Hanak writes, ‘Oppression was followed by oppression, dictatorship by dictatorship, devastation by devastation. It is not easy for democracy and freedom to take firm root in this battered region of Europe.’ Hungary on a Fixed Course: An Outline of Hungarian History, in J. Held (ed.), The Columbia History of Eastern Europe in the Twentieth Century (New York: Columbia UP, 1992), 204. 16 See n. 2 above, 4. 17 See A. Arato, Civil Society, Constitution and Legitimacy (Lanham, MD: Rowman & Littlefield Publishers, 2000), 81–127.
The 1848 revolution and freedom fight against Habsburg absolutism\(^\text{18}\) was introduced by a liberal period that Istvan Bibo describes as follows: ‘...Hungary between 1825 and 1848... reacted to the movement of European democracy and patriotism with such energy that it filled the ‘Western European contemporaries with the greatest hopes’.\(^\text{19}\) Lajos Kossuth, the leader of the revolution, who was celebrated both in England and in the US after the defeat of the revolution, became nationally known through his *Parliamentary Reports*, distributed in 1833 in about 70, later 100 subscribed, handwritten copies around the country by mail. The then existing system of censorship did not cover private letters, but as Istvan Deak points out, ‘Kossuth’s mailing campaign clearly contradicted the laws on the press.’\(^\text{20}\) Still, the laxity of the censorship allowed this particular press to function, although as Deak writes, ‘the personal authorization of the monarch was needed to set up even a single printing press, and censorship was both extensive and irrational’.\(^\text{21}\) But when in 1833, Kossuth secretly bought a lithographic press in Vienna to print his *Parliamentary Reports*, his press was confiscated.\(^\text{22}\) He had to continue his reports without being able to print them, until 1836: the end of the four years long session of the Parliament. Then he started the *Municipal Reports*, but as he was not allowed to use the mail any longer to distribute his particular press, he had to rely on travellers to carry the copies of the biweekly reports. Finally, as Deak writes, ‘the twenty-fourth issue of the *Reports* was confiscated and in the spring of 1837 he was arrested... and charged with disloyalty and sedition’.\(^\text{23}\) He was convicted, but released after three years, and at the beginning of 1841, he became the editor of the then started, printed newspaper, *Pesti Hírlap* (*Pest News*). Until 1844, when he was removed, he could run ‘an almost free press’, with a circulation higher than five thousands copies.\(^\text{24}\) In Deak’s explanation, perhaps it was made possible, besides the tactical moves of the government, by ‘the sympathy of the censors, who, as teachers and ecclesiastics, were not immune to the liberal and nationalist\(^\text{25}\) sentiments sweeping the educated public’.\(^\text{26}\)

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\(^{18}\) The 1848 revolution was also a fight for Hungary’s independence from the Habsburg Empire. It was the longest lasting among the 1848 revolutions in Europe, and was suppressed with the help of the troops of the Russian tzar in 1849. As Paul Ignatius writes: ‘The Hungarian War for Freedom against Habsburg absolutism in 1848–49 was a unique feat of valour which mesmerized liberal world opinion and resounded for decades to come in the poems of Swinburne and W. S. Landor and Matthew Arnold, of Francois Coppée and Heinrich Heine.’ *Hungary* (London: Benn, 1972), 57.


\(^{21}\) Ibid.

\(^{22}\) As Istvan Deak describes, ‘the government was so timid, or so generous, that it amply paid Kossuth for his financial loss’. See ibid., 30.

\(^{23}\) Ibid., 31–3.

\(^{24}\) Ibid., 41.

\(^{25}\) It was nineteenth-century nationalism, in which, as Ignatius writes, ‘the currents towards national and human liberty united, at least for a while’. See n. 18 above, 49–50.

\(^{26}\) See n. 20 above, 41.
At the beginning of the 1848 revolution, the revolutionaries, led by poet Sandor Petofi, issued ‘the first uncensored Hungarian leaflets’. Petofi and his fellow rebels, as Deak writes, ‘seized the largest printing shop’ in Budapest and ‘leaflets containing the Twelve Demands and the National Song’ were printed on the spot and thrown to the multitude. Thus freedom of the press was established by one peaceful stroke. Among the twelve demands of the revolution, the first one was the abolishment of censorship and the freedom of the press.

Few days before the 1918 revolution actually took place on 30th October, the National Council of the upcoming revolution, as one of its members, Oscar Jaszi recalls, ‘contented itself with issuing its proclamation of October 26, 1918, in all the papers, in defiance of the censorship’. Following the tradition of the 1848 revolution, the National Council published its programme in twelve points. As Mihaly Karolyi, the prime minister of the revolution writes, ‘the censorship of the press was abolished by the arbitrary action of the journalists, who simply refused to submit their manuscripts to the censor’. The revolution turned Budapest, in the words of Jaszi, ‘into a gigantic debating society’.

The memory of the first uncensored leaflet in Hungarian also inspired the students and other revolutionaries of the 1956 revolution. On the evening of 23 October, the first day of the revolution, the students (like Petofi and his fellows in 1848) wanted freedom of the press, in the words of Justice Brandeis, ‘both as an end and as a means’. They were determined to let the public know about their claims (listed in points as the Twelve Demands in 1848) through the most effective mass communication tool of their time which in 1956 in Hungary was the national radio. But this time a peaceful stroke was not enough to succeed. The staff of the radio refused to broadcast the students’ Points in full. Instead it aired a speech by one of the infamous leaders of the dictatorship who brutally accused the ‘provocateurs’ and ‘enemies’ of the communist party. It led to the seige of the radio building. When the crowd that pulled down the monumental Stalin statue at the edge of the City Park heard that the political police had started to fire on and kill demonstrators at the radio, people rushed there.

As Francoise Fejto writes:

It was like the Danube during the spring floods. . . . The radio was the voice of the nation, but it was an enslaved voice, distorted, void of meaning. It was by means of the Budapest

27 See n. 18 above, 54.
28 The National Song, written by Sandor Petofi, was the emblematic poem of the revolution and the fight for Hungary’s independence.
29 See n. 20 above, 71.
30 After a few months, the 1918 revolution was followed by a communist dictatorship which, after another few months, was followed by counter-revolution.
33 See n. 31 above, 42. 33a Whitney v. California, 274 US 357 (1927), 375.
34 See n. 18 above, 236–7.
radio that the regime had always flooded the country with lies. The Hungarians rose in arms because they wanted the truth to take over the radio.35

By the next morning, after tragic bloodshed, the revolutionaries took over the radio building while already late at night they occupied the premises of the Szabad Nep,36 the daily newspaper of the communist party, and published an extra edition that condemned the political police that guarded the radio.37 In the words of Paul Ignotus, there was a ‘pouring-out of Points’.38 As Fejto, Istvan Bibo—the last member of the government who stayed in the Parliament building until the Soviet troops occupied it on 4 November—also writes that the 1956 revolution, among its other fundamental goals, expressed ‘opposition to the authority that arbitrarily distorts reality, news, ideas, and teachings in the service of its own interests, leading to a demand for truth and honesty in public and cultural life’ and ‘freedom of criticism, communication of facts as they are’.39

During the years when Hungary was a communist country (between 1948 and 1989) the primary use of the incitement provision of the criminal code was to protect the ruling totalitarian ideology from dissent. The ideological character of the Criminal Code of the communist system is well captured in its provision on ‘insult against a community’ that included ‘socialist conviction’ among the listed targets, instead of including political conviction in general.40 The communist, soviet-type constitution declared rights, but as empty slogans. Freedom of the press could be practised only in line with the presumed interest of the socialist society, an interest as defined by the totalitarian party.

A free press existed only underground, from the end of the 1970s. At the beginnings of the samizdat41 in Hungary, publications like Kossuth’s Reports multiplied, producing a few copies by using typewriters with indigo. But soon, a whole underground system was developed with secretly located stencil machines and collective personal distribution, the latter similar to the spread of the Municipal Reports. The samizdat-producing, so-called democratic opposition took freedom of the press and other rights seriously, as if they were free citizens.42

35 F. Fejto, Behind the Rape of Hungary (David McKay Company, Inc. 1957) 185, 187.
36 The hypocritical title of the infamous propaganda paper means ‘free people’ in Hungarian.
37 See n. 18 above, 238–9.
38 Ibid., 244.
40 ‘... insult against a community included using, in front of others, an offensive or denigrating expression against the Hungarian nation and groups or persons, based on their nationality, religion, race, or socialist conviction, or committing other similar acts [original s. 269 para. (2)]’, Decision 30/1992 (V. 26.) AB, 3, <http://www.mkab.hu/content/en/en3/13589104.htm> (last accessed 24 July 2008).
41 Samizdat is the Russian word for the underground literature in the communist regimes. The largest collection of samizdat publications can be found in the Open Society Archives, in Budapest, <http://www.osa.ceu.hu> (last accessed 24 July 2008).
One of the leading dissidents, Miklos Haraszti, wittily captures the absurd way in which public discourse was exercised under communist rule, the Orwellian circumstances in which the memory of the already deeply traumatized society also suffered great damage:

Real communication takes place only between the lines. And it is public life itself that is the space between the lines . . . Actually, we have no idea what our message would be if it could be freely articulated . . . If state artists fight for anything between the lines, it is solely for the survival of this space.  

As a result of overall censorship, there was no opportunity freely to discuss public matters including the Holocaust and Hungary’s part in it. Most of the Jewish Hungarians of the countryside were killed in 1944; Budapest is a city of many Holocaust survivors. Antisemitic speech in Budapest can be compared to neo-Nazi speech in Skokie, Illinois where antissemites were allowed by the courts to march in a neighbourhood largely populated by Holocaust survivors. But Budapest, with the largest remaining Jewish community of Central Europe, is a city where the persecution actually took place in the most horrific ways. There could scarcely be more painfully sensitive racist speech than has existed in this least until 1986–87, were publishing, lecturing, discussing, and teaching, and the key hope seemed to have been the building of the moral bases of democratic structures and practices. ‘Social Theory, Civil Society, and the Transformation of Authoritarian Socialism’ in Crisis and Reform in Eastern Europe (this note), 22.

43 Reclaiming memory against the ‘contract of forgetting’ (in the phrase of one of the leading dissidents, Janos Kis, quoted by Tony Judt) was a central theme of the democratic change at the end of the communist system. See Judt in n. 42 above, 280. See also T. G. Ash, We The People—The Revolution of ’89 Witnessed in Warsaw, Budapest, Berlin & Prague (Cambridge: Granta Books, 1990), 47–60.


45 For an in-depth analysis of Hungarian society’s responsibility for the Holocaust, see I. Bibo, ‘The Jewish Question in Hungary after 1944 (1948)’ in n. 19 above, 153–322.


Central-European country. Undoubtedly, therefore, Hungary is one of the political communities with a strong reason to impose criminal prohibitions on antisemitic and other racist speech. According to a 1999 survey among the interviewed Jewish Hungarians, 85 per cent consider it acceptable to place legal restrictions on the public expression of antisemitic views, while 59 per cent support such sanctions against Holocaust deniers.

Besides antisemitism, an equally important argument for using criminal law to ban racist speech is the hatred against Roma Hungarians, the largest, Holocaust-surviving minority in Hungary. Roma Hungarians (who are disadvantaged by unemployment rates much higher than average, income much lower than average, and life expectancy much shorter than average) face not only prejudice and denigration, but segregation in schools and discrimination in employment, in hospitals, and in law enforcement.

According to the website of Radio C, a not for profit Roma, community radio station in Budapest since 2001, about 200,000 Roma Hungarians live in and around Budapest, more than 100,000 of them in Budapest. But data on the number of Hungarian Roma is contested, because ‘according to census data gathered once every 10 years (and based on self-identification), the number of Roma in Hungary was half the number calculable on the basis of the school data. Such distortion was apparent even in the 2001 census.’ Under the law on the protection of personal data, sensitive personal data (such as data concerning ethnic identity) can be accessed and processed only if the data subject provides her written, informed consent, without coercion. This regulation is in sharp

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52 See R. Izsák: “Gypsy Rooms” and Other Discriminatory Treatment Against Romani Women in Hungarian Hospitals (2004), <http://www.errc.org/cikk.php?cikk=2063&archiv=1> (last accessed 24 July 2008). See also the recent decision of the European Court of Human Rights that ruled against the Czech Republic in a school segregation case: D.H. and Others v. the Czech Republic (Application No. 57325/00), 13 November 2007. This landmark decision will have an impact on segregation in Hungarian schools as well.
contrast with recent anti-Roma discriminatory practices in data processing. As Gyorgy Kerenyi, founding editor of Radio C, writes, ‘...until the 1960s, the Roma had identity cards of distinct color. Until 1989 Roma criminals (and their families) were registered separately with the police’. 57

We have tremendous data about widespread anti-Roma prejudice. As Kerenyi writes, ‘According to a 1995 survey, 67 per cent of Hungarians are convinced that the inclination to commit crime is inherent in “Gypsies” blood.’ 58 Particularly negative portrayal in the media against the Roma reinforces bad stereotypes. Jenő Zsigo, president of the Roma Parliament, a civil organization of the Hungarian Roma described the sole exception where the Roma are positively portrayed as follows: ‘The only image of us they tolerate is that of the dancing slave.’ 59

As Helen Darbishire writes, ‘some speech which is undoubtedly offensive, does not constitute hate speech, even though it may contribute to a climate of prejudice and discrimination against minorities’. 60 The results of a 1996–1997 content analysis of the national and regional daily newspapers describe the design of anti-Roma press reports, obviously effective, whether or not they constitute ‘hate speech’:

Almost two-thirds (60 per cent) of the articles presented individual Roma without indicating any particular qualities other than their ethnicity; these persons were presented simply as ‘gypsies’, embodiments of the whole group. In addition, only 25 per cent of the Roma in the sample could speak directly; in the remaining three quarters of the cases, the reader could only learn about Romani opinions through the mediation of a third person. This ratio is striking when compared to non-Roma: 64 per cent of them had the opportunity to express their opinions directly in articles on Romani issues. 61

Under such circumstances, it would be imperative for democratic parties and all other forces to unite against all forms of racism and discrimination. But this response is not embedded in the political culture, so is almost completely absent. Recently, a journalist, Zsolt Bayer wrote in a daily newspaper, Magyar Hirlap, about Jewish journalists ‘they are our reason—Jews, meaning their bare existence is a reason for anti-Semitism’. The article was condemned by the leader of the centre-right Hungarian Democratic Forum, Ibolya Dávid, Budapest’s liberal Alliance of Free Democrats mayor Gábor Demszky, the Hungarian Journalists’ Association (MŰOSz), and several other politicians and professional organizations. Some institutions, among them ‘Budapest City Hall, announced they had

57 G. Kerenyi, ‘Roma in the Hungarian Media’ (Fall 1999) After the Fall: Media Studies J. 141.
58 Ibid.
59 Quoted in n. 57 above, 147.
cancelled their *Magyar Hirlap* subscriptions. But the publisher of *Magyar Hirlap*, ‘entrepreneur, media owner and one of the Hungary’s wealthiest people, Gábor Széles has publicly defended’ Bayer, and leaders of the allegedly centre-right Federation of Young Democrats—Civic Alliance, a party much larger than the Hungarian Democratic Forum, publicly kept Bayer company at the birthday celebration of their party. Jean-Yves Camus includes a similar example in his study on the use of racist, antisemitic, and xenophobic elements in political discourse: ‘In January 2004 an Israeli flag was burned during a demonstration by the Civic Circles, a political association set up by the former Conservative Prime Minister Viktor Orbán just after his defeat in the 2002 general election’.

Although the racist Hungarian Life and Justice Party, elected to the parliament in 1998, lost its seats in 2002, there is no clear common platform to reject the prevalent appearances of undeniable racism. In the autumn of 2004, the Parliament passed a declaration, supported by all the four parliamentary parties at the time, which condemned the activity of a group advocating a programme similar to that of Hungary’s extreme National Socialist Arrow Cross party that was in power for some months beginning in October 1944. However, condemning a small group of extremists is ersatz displacement when coded and sometimes overt racism can be heard from allegedly moderate, democratic circles.

3. The Application of the ‘Clear and Present Danger Test’ in Hungary

(i) The ‘Hate Speech’ Decisions of the Hungarian Constitutional Court

The Constitutional Court, in the years since its establishment in 1989, has embodied the liberal spirit of the post-communist transition by establishing freedom of speech as a core value of the new democracy. The first profoundly important Constitutional Court decision on ‘hate speech’ came in 1992. It did not review a case because the Constitutional Court provides abstract constitutional adjudication of the laws. The Supreme Court and the lower courts

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63 Ibid.
64 J.-Y. Camus, ‘Study on the use of Racist, anti-Semitic and Xenophobic Elements in Political Discourse’, *The Use of Racist, anti-Semitic and Xenophobic Elements in Political Discourse* (Council of Europe: European Commission against Racism and Intolerance, 2005), 38.
65 As András Kovács argued, ‘Extreme right wing parties today (...) are dangerous primarily not because they create xenophobia but because they attempt to organize it into a conceptual system and link it to existing serious socio-economic problems’, ‘Xenophobia, Anti-Semitism and the Extreme Right in Europe’, *Racism in Central and Eastern Europe and Beyond: Origins, Responses, Strategies. Report* (Budapest: Open Society Institute, 2000), 55.
66 See n. 40 above.
decide the cases and they can request the Constitutional Court to review the regulation they have to apply. In this complex system, the Supreme Court and the lower courts, when they construe the law, have to follow the law’s abstract interpretations presented in the Constitutional Court decisions.\textsuperscript{68}

Decision 30/1992 reviewed the ‘hate speech’ provision of the Criminal Code. Despite the tragic history of the country, or because of it, the reasoning of Decision 30/1992 calls upon the famous ‘clear and present danger’ test of the Supreme Court, as it was first formulated by Justice Holmes in the opinion he wrote in the \textit{Schenk} case\textsuperscript{69} and in his landmark dissent in the \textit{Abrams} case.\textsuperscript{70} The rich and beautiful language of the best parts of the Constitutional Court’s free speech decisions written in the early nineties reveal the writers’ familiarity with the great texts of free speech opinions of the Supreme Court.\textsuperscript{71}

Decision 30/1992 played a decisive role in the Hungarian constitutional argument about freedom of speech and public debate.\textsuperscript{72} The reasoning of the decision mirrors the political climate of a freshly post-dictatorial country, where liberty was rare and where people appreciated the value of free expression that had not existed for long decades:

Historical experience shows that on every occasion when the freedom of expression was restricted, social justice and human creativity suffered and humankind’s innate ability to develop was stymied. The harmful consequences afflicted not only the lives of individuals, but also that of society at large, inflicting much suffering while leading to a dead end for human development. Free expression of ideas and beliefs, free manifestation of even unpopular or unusual ideas is the fundamental requirement for the existence of a truly vibrant society capable of development.\textsuperscript{73}

The Court’s reasoning reflects the sensibility of a people who have first-hand experience of freedom denied. It highlights not the risk of allegedly or really dangerous speech, but rather the risk of restricting freedom of speech on the basis of its content, the danger of censorship. Secondly, the decades of enforced silence under communist rule did not allow open discussion of the Holocaust or of the communist system itself, including its darkest, Stalinist years. Further restrictions on the free expression of ideas on the basis of their content, even under

\textsuperscript{68} About different models of constitutional adjudication see A. Sajo, \textit{Limiting Government: An Introduction to Constitutionalism} (Budapest: Central European UP, 1999), 225–44.
\textsuperscript{69} \textit{Schenk v. United States} 249 US 47 (1919).
\textsuperscript{71} The political elite in Hungary maintains a long tradition of familiarizing itself with American democracy. For example, liberal leaders in nineteenth-century Hungary (most of them enlightened aristocrats and noblemen) were well-versed in Alexis de Tocqueville’s famous work about the American democratic system.
\textsuperscript{72} For a critical assessment of the decision see A. Sajo, ‘Hate Speech for Hostile Hungarians’ (1994) 3 \textit{E. Eur. Const. Rev.} 84.
\textsuperscript{73} See n. 40 above, 6–7.
democratic circumstances, could have a chilling effect on the free debate of tragic events and periods in the country’s history. Thirdly, both the lack of freedom of speech and the country’s terrible record on discrimination and persecution left the drafters of the new constitutional system (among them Jewish Hungarians) keen to avoid providing any opportunity for the state to discriminate against people and their opinions. These considerations led to an especially strong commitment to the constitutional value of freedom of speech. As the Court stated,

...A change of political system is inevitably accompanied by social tensions... [but just because of these]...unique historical circumstances...a distinction must be made between incitement to hatred and the use of offensive or denigrating expressions.74

The Court did not use Hungary’s burdensome history and the unavoidable difficulties of the democratic transition as reasons to justify the content-based prohibition of ‘hate speech’. Instead, the Court’s constitutional argument separated incitement to hate from speech that is offensive but does not incite to hate. The Court drew a distinction between constitutionally protected and unprotected speech, the latter of which can be banned by criminal law, by holding that the content-based criminal prohibition of derogatory speech (as opposed to incitement that is not banned on the basis of its content, but only if it leads to a clear and present danger) was unconstitutional. The Court struck down the second provision of Article 269 of the Criminal Code, which stated that:

Anyone who in front of a large public gathering uses an offensive or denigrating expression against the Hungarian nation, any other nationality, people, religion or race, or commits other similar acts, is to be punished for the offence by imprisonment for up to one year, corrective training or a fine.75

The Court ruled that only the first provision of Article 269 of the Criminal Code contained a constitutional, necessary, and proportionate restriction on freedom of speech, a right the court considered to be ‘the “mother right” of...the so-called fundamental rights of communication’,76 which include the right to free speech, freedom of the press, freedom of information, and in a broader sense, artistic and scientific freedoms. The first provision of Article 269 states that:

A person who, in front of a large public gathering, incites hatred against a) the Hungarian nation,

b) any national, ethnic, racial or religious group, further against certain groups among the population, commits a felony and is to be punished by imprisonment for a period of up to three years.77

The decision deduced the criminal legal limitation of freedom of expression partially from the disturbance of public peace, but the Court in the key part of its argument reasoned about the incitement of hatred as follows:

74 Ibid., 16. 75 Ibid., 2. 76 Ibid., 5. 77 Ibid., 2.
The disturbance of the social order and peace ... also contains the danger of the large-scale violation of individual rights: whipped-up emotions against the group threaten the honour, dignity (and in the more extreme cases, also the lives) of the individuals comprising the group, and by intimidation restrict them in the exercise of their other rights as well (including the right of freedom of expression). The behaviour criminally sanctioned ... poses a danger to individuals’ rights, too, which gives such weight to public peace that ... the restriction on the freedom of expression can be regarded as necessary and proportionate.... [T]his reasoning considers not only the intensity of the disruption of public peace which—above and beyond a certain threshold (“clear and present danger”)—justifies the restriction of the right to freedom of expression. What is of crucial importance here is the value that has become threatened: the incitement endangers subjective rights also having prominent places in the constitutional value system.78

A closer analysis of the Court’s reasoning illuminates the applied interpretation of the ‘clear and present danger’ test, and this phrase is quoted in English. Once public peace is disrupted, we can hardly worry that it might be disturbed. The decision, although using the clear and present danger standard in a sentence about disturbance of the public peace, emphasizes that what is pivotal to meet the test is that individual rights are endangered. Therefore, the constitutionally punishable crime of incitement is completed only when the rights that are threatened when the public peace is disturbed are in a state of clear and present danger. In this way, the case by case analysis, required under Decision 30/1992, may determine whether the particular expression disturbed the public peace to an extent where individual rights were clearly and presently endangered, thus justifying the restriction of freedom of expression. The Court held that it is not sufficient merely to analyse whether public peace has been disturbed to determine the relevant criminal legal boundaries of speech. If we did not make the clear and present endangerment of individual rights a condition for curtailing freedom of expression, the majority could unduly restrict public discourse by claiming that the respective speech disturbed the public peace. As a result, the Roma’s response to anti-Roma speech, which could offend the non-Roma majority, may be jeopardized and might fall outside the constitutional protection of the right to freedom of expression. At the same time, the customary use of denigrating language about Roma would likely be protected expression, because as part of the traditional local discourse it could be considered by the biased majority to be speech that does not disturb the public peace.

The Court argued in its Decision 30/1992 that ‘the decision does not exclude the possibility for the legislature to extend the scope of criminal sanctions beyond incitement to hatred’.79 But when Parliament, responding to public pressure aroused by the acquittal of leaders of racist organizations actually extended the related regulation in 1996, 2003, and 2008, the Court repeatedly struck down the

78 Ibid., 14–15. 79 Ibid., 17.
new, broader criminal restrictions on speech. In Decision 12/1999 the Court argued:

In addition to incitement to hatred, ordering the punishment of other acts suitable for the arousal of hatred as new forms of conduct constituting the offence reflect the legislature’s intention to punish specific conducts beyond the scope of incitement to hatred . . . the constitutional threshold of culpability . . . [I]t is only incitement that incorporates a level of danger “above a certain limit” that may allow the restriction of the freedom of expression. Punishing other acts suitable for the arousal of hatred would diminish the threshold of culpability. If the level of danger reaches the scale of incitement, there is no need to specify “other acts” as the statutory definition of incitement covers such conduct.

Andras Sajo wrote in 1994, that in fact ‘the Hungarian Court failed to recognize the overbroadness of the incitement provision’. Since then, while the Constitutional Court has been persistent in upholding its 1992 decision, the Supreme Court and lower courts (building on the Constitutional Court’s interpretation of incitement to hatred) have provided a rather narrowly tailored understanding of the Hungarian ‘clear and present danger’ test, construing it as a ‘clear and present danger of violence’ test, close to the rule set up in the Brandenburg case.

In its third related decision, in 2004, the Constitutional Court stressed that equality also triggers state restraint from content-based regulation of speech, because:

. . . the state may not prohibit the expression and the dissemination of any views merely on the basis of their contents, nor may certain opinions be declared more valuable than others, as this would violate the requirement of treating individuals as persons of equal dignity (such a prohibition would result in preventing certain groups of people from expressing their personal convictions), and—by excluding certain views—prevent the development of a free, lively and open debate involving all relevant opinions, even before a political discourse could emerge.

But should even racist speech be part of public discourse? Is racism a ‘relevant opinion’? What would require a democracy to tolerate racist expressions in its political debates? The answer lies in what Robert Post calls the ‘paradox of public discourse’, ‘the First Amendment, in the name of democracy, suspends legal enforcement of the very civility rules that make rational deliberation possible’.

81 Decision 12/1999 (V. 21.) AB ibid. 6–7.
82 See n. 72 above, 86.
84 Decision 18/2004 (V. 25.) AB in n. 80 above, 7.
Of course, making public discourse possible is only one of the many reasons for prohibiting racist speech. But the ‘paradox of public discourse’ includes the equality argument of the Constitutional Court. As Post writes:

The norm of equality violated by racist speech . . . is substantive; . . . It is the kind of norm that ought to emerge from processes of public deliberation. Although the censorship of racist speech is consistent with this substantive norm of equality, it is inconsistent with the formal principle of equality, because such censorship would exclude from the medium of public discourse those who disagree with a particular substantive norm of equality. Such persons would thus be cut off from participation in the processes of collective self-determination.

First Amendment doctrine has tended to resolve the paradox of public discourse in favour of the principle of formal equality, largely because violations of that principle limit pro tanto the domain of self-government, whereas protecting uncivil speech does not automatically destroy the possibility of rational deliberation.87

The Constitutional Court seems to follow the same logic in its 2004 decision, emphasizing that only the consequentationalist approach (as opposed to one that is content-based) can meet the strict constitutional requirement to protect freedom of speech: ‘Even in the case of extreme opinions, it is not the contents of the opinion but the direct and foreseeable consequences of its communication that justify a restriction of free expression and the application of legal consequences . . .’88

In its Decision 30/1992 the Court states that ‘abusive’ language (or other equivalent forms of expression) should be answered by a public that should develop its critical ability to respond to such speech through cleansing debate:

Only through self-cleansing may a political culture and a soundly reacting public opinion emerge. Thus one who uses abusive language stamps himself as such and in the eyes of the public he will become known as a ‘mudslinger’. Such abusive language must be answered by criticism.89

The Court’s argument for the need to answer ‘abusive’ speech with criticism reflects the American free speech literature. The wording may remind the reader familiar with the landmark First Amendment cases of the famous concurring opinion of Justice Brandeis in Whitney:

Those who won our independence by revolution were not cowards . . . If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.90

The distinction made by the Constitutional Court between incitement to hate and the use of denigrating expressions can be understood as the distinction between speech that allows the opportunity ‘to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education’, and speech

87 Ibid., 304.
88 Decision 18/2004 (V. 25.) AB in n. 79 above, 7.
89 Decision 30/1992 (V. 26.) AB in n. 40 above, 17.
that causes danger without allowing time for answer by criticism. In the latter case, in the words of Justice Holmes, ‘an immediate check is required to save the country’.

Of course, averting the evil by criticism requires engagement, which is presumably less comfortable than relying on the state to prohibit, for example, racist speech. But, even the criminal prohibition of racist expressions cannot work without the engagement of the overwhelming majority of the political community in a rejection of racism. If such a rejection exists, prohibition becomes an additional, rather symbolic act. If such a rejection does not exist, the prohibition of racist speech is likely to be abused against the very minorities the regulation allegedly aims to protect.

Rejection by engaged criticism should be understood in the broadest possible sense. Most importantly, it should involve the widespread, creative use of all educational opportunities to build not only tolerance, but mutual understanding between the different communities, the mutual respect of the coexisting cultures based on knowledge and a consciously crafted, rich network of personal connections and cooperation.

Such an engagement is particularly important in newer democracies like Hungary, where the experiences of authoritarian regimes discouraged participation in public matters. Thus, active rejection of racism can contribute to build a participatory citizenry. It can also help the development of good character in the members of society, in the sense as Vincent Blasi writes,

... a regime of free speech can help to develop character by requiring those who would beat back bad ideas and contain evil demagogues to pursue those worthy objectives in the most arduous way: engagement rather than prohibition... In this view, the most dangerous ideas can be defeated only by strong persons, not by repressive laws.

Another aspect of civic engagement could be the use of civil law against denigrating speech. This is suggested by the Constitutional Court, and the Court

93 The Constitutional Court also mentioned that besides criminal sanctions ‘there are other means available, such as expanding the possible use of moral damages, to provide effective protection for the dignity of communities’. But in the Hegedus Jr. case (the facts and criminal court aspects of which I will describe later in this article) except in one lower court decision which was reversed by the appellate court, civil courts have refused to grant standing to persons who were not been personally identified in an antisemitic article written by Hegedus Jr., but had tried to sue for damages.

An amendment of the Civil Code, accepted in Parliament in October, 2007, would have provided standing for members of minority groups if their group is targeted by ‘hate speech’, but in July 2008, the Constitutional Court held the amendment unconstitutional (Decision 96/2008 (VII.3) AB). In September 2008, the Minister of Justice introduced a new bill to Parliament in the hope that it will not only be accepted but will also pass the constitutional muster. The only plaintiff successful in suing for damages in such a case was a Roma-Hungarian bus driver who sued because of an anti-gypsy article that alleged that Romans are threatening and even killing the Hungarians. The bus driver could successfully claim standing because the anti-gypsy article (published in Magyar Forum, an extreme-right weekly, edited by the president of MIEP) he challenged had accused only Roma Hungarians of a village in Pest county where he lives, and the article had also described a ‘K-clan’ as the worst Roma group in the village, where the first letter of the
stresses that criminal law should be applied as a last resort, and it should not be considered a means to improve the style of public discourse:

The prospect of a large amount of compensation is also part of this process. However, criminal sanctions must be applied in order to protect other rights and only when unavoidably necessary, and they should not be used to shape public opinion or the manner of political discourse, the latter approach being a paternalistic one.94

The desire to avoid paternalistic control by the state derives from the experience under the dictatorships from which democracy in Hungary emerged. The distrust of state regulation in setting the boundaries of public discourse is similar in Hungary and in the United States: two countries with very different histories. Yet, it is a sensibility shared by Americans and Hungarians. Pursuant to this deeply rooted belief in freedom of speech, exercising caution means braving free public debate. It is an idea that reflects the most important paradox of ‘hate speech’ laws because such laws are at least partially based on the conviction that insofar as ‘hate speech’ is dangerous (as it is in many instances) a cautious society should prohibit it by criminal law. The American-Hungarian approach realizes rather the danger of arbitrary restrictions on freedom of speech, starting with the difficulties of defining ‘hate speech’, considers the lack of content-based prohibition of alleged ‘hate speech’ by the criminal law as the cautious approach, and relies on robust public rejection of expressions of hatred.

The question is whether the strong statements in the relevant decisions of the Constitutional Court will become a shared cultural frame of reference in Hungarian society? In the United States, although the Holmes and Brandeis dissenting and concurring opinions reflected the minority view on the Supreme Court at the time, they inaugurated the modern understanding of the First Amendment.95 Stretching the boundaries of freedom of speech as far as possible through the decisions of the Constitutional Court, the challenge for the political community in Hungary is to develop a broad consensus against overt and coded forms of racist speech, a consensus that should be strongly reinforced whenever such expressions occur.

But those who follow the political environment of Hungary might wonder to what extent this post-Holocaust, post-communist society is ready to reject racist expressions. Andras Sajo, one of the strongest advocates of freedom of speech in Hungarian constitutional discourse, two years after the 1992 landmark decision of the Constitutional Court, ventured the opinion that the Court might be

plaintiff’s last name was ‘K’ and his wife actually belongs to the family called ‘K-clan’ by the article. The civil court granted him standing and awarded him moral damages that are awarded in cases of non-propriety loss, for causing significantly harder living and working conditions for the plaintiff.

94 See n. 40 above, 17.
compelled to change its position. The discouraging examples might outweigh the encouraging ones, but a recent development provides some hope. At the end of August 2007, the flag of the Hungarian Guard, an extreme-right paramilitary organization, was blessed by a representative of each of the three major Christian denominations (Catholic, Evangelical, and Reformed Church), without the knowledge or authorization of their churches. Yet, in January 2008, a regional head of the Catholic Church in Veszprem (in Western Hungary) did not allow the blessing of the flag of the Guard.

‘Only through self-cleansing may a political culture and a soundly reflexive public opinion emerge,’ wrote the Constitutional Court in 1992. How far has the process of ‘self-cleansing’ gone since the Court laid down its argument? Has ‘self-cleansing’ worked in the 16 years following Decision 30/1992? Is 16 years enough time for a society to go through the psychological process necessary to change cultural behaviour and attitudes? Do the European Union, the Council of Europe, the Organization for Security and Cooperation in Europe, and other international organizations (Hungary is a member in all of them) provide sufficient defence against the danger of hateful ideas while allowing for a longer period of ‘self-cleansing’? Finally, how can tolerating ‘hate speech’ contribute to ‘self-cleansing’?

As Frank Michelman writes, ‘we need not credit Nazis marching through Skokie with expanding the menu of visions from which individuals choose their truths.’ John Stuart Mill however, at the end of the second chapter of his essay on liberty recapitulates the four grounds that in his view justify the liberty of thought and discussion, including the value of letting even obviously wrong opinions be freely expressed. Although we can immediately cast off his first two reasons because racist speech cannot be true, or cannot even ‘contain a portion of truth,’ Mill’s next arguments appear pertinent to the ‘hate speech’ debate. He writes:

Thirdly, even if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds. And not only this, but, fourthly, the meaning of the doctrine itself will be in danger of being lost or enfeebled, and deprived of its vital effect on the character and conduct: the dogma becoming a mere formal profession, inefficacious for good, but cumbering the ground and preventing the growth of any real and heartfelt conviction from reason or personal experience.

96 ‘It remains to be seen whether tragic historical experience and burning social conflicts do not, in effect, compel constitutional courts to “constitutionalize” specific content-based restrictions on speech in order to protect racial groups and other minorities.’ See n. 72 above, 87.


100 Ibid.
The Hungarian Civil Liberties Union (HCLU) offers a similar reflection, but goes even further than Mill. In the view of the HCLU, banning opinions that would challenge the truth not only results in accepting the truth ‘in the manner of a prejudice’ or as a ‘dogma’ as Mill writes, but might make the general public reluctant to believe the factual statements of historians. The HCLU explicitly mentions Holocaust denial as an example, and argues that:

prohibiting the expression of any views, even those which are obviously false, may harm the community. As long as it is not forbidden to deny an established truth (eg, that the Holocaust took place), the general public has good reason to believe that what the experts say about the facts of history is true. If it becomes forbidden publicly to deny a thesis, the general public will be deprived of any basis for its belief in what the expert says.

Free speech theories provide many more explanations for the American-Hungarian approach to ‘hate speech’. In addition to the argument for truth, another instrumental justification for freedom of speech is that, without it, democratic self-government simply cannot work. Alexander Meiklejohn argued that: ‘When men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger… To be afraid of ideas, any idea, is to be unfit for self-government.’ The self-government rationale for freedom of speech is connected to the idea of limiting government in order to create and maintain open, robust public discourse which serves as a fundamentally important check on governmental power. Vincent Blasi called it the ‘the checking value’ in the First Amendment of the US Constitution. As Blasi writes:

…free expression is valuable in part because of the function it performs in checking the abuse of political power, … While a proponent of the checking value may regard free expression as important partly because of its contributions to progress, wisdom, community, and the realization of individual potential, he is likely to value free expression primarily for its modest capacity to mitigate the human sufferings that other humans cause. Much of that suffering is caused by persons who hold public office.

As opposed to instrumental justifications of freedom of speech, the argument based on individual autonomy supports the free communication of information and ideas as an independent value, not as a value that serves another goal. Dworkin emphasizes that the constitutive justification of freedom of speech—that does not rely on the instrumental value of it—provides the necessary broad

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101 Here, the HCLU should have written about restriction on the denial of ‘facts’ instead of ‘a thesis’, because there is a fundamental difference between questioning historical facts and challenging opinions.
106 Ibid., 538.
protection for all forms of expression.\textsuperscript{107} Beside the speaker’s point of view, Dworkin also lays down a clear argument from the perspective of the listeners: ‘We retain our dignity, as individuals, only by insisting that no one—no official and no majority—has the right to withhold an opinion from us on the ground that we are not fit to hear and consider it.’\textsuperscript{108}

Edwin Baker argues that freedom of speech has to be respected because it is ‘central to individual liberty’:

\ldots freedom of speech is fundamental less because of its instrumental value or the value of reasoned arguments and more because freedom to engage in self-expressive acts is central to individual liberty… Part of the reason to protect speech… is a commitment to the view that people should be able to participate in constructing their world.\textsuperscript{109}

The individual autonomy-based arguments stress the point that all of us have the right to express what we wish to say, and to hear what others wish to express. Robert Post, in his participatory theory, analyses how the open public debate provides individuals’ authorship in democracy even if their opinions do not attain majority support.\textsuperscript{110} Without the opportunity of such authorship, the very legitimacy of the democracy is undermined.

Even if it is arguable that the search for truth in the marketplace of ideas supports a constitutional ban on content-based ‘hate speech’ laws, other theories (some examples of which were mentioned above) provide stronger justifications for the American-Hungarian approach. It is no accident that the Constitutional Court combines the argument for individual freedom with an analysis of the social process of open public discourse:

The Constitution guarantees free communication—as an individual behaviour or a public process—and the fundamental right to the freedom of expression does not refer to the content of the opinion. Every opinion, good and damaging, pleasant and offensive, has a place in this social process, especially because the classification of opinions is also the product of this process. . . . With the freedom of the press having become a reality no-one speaking out publicly may invoke external compulsion, and with every line penned he gives himself out and risks his entire moral credibility.\textsuperscript{111}

(ii) The Hegedus Jr. Case and Its Aftermath: The Failure Properly to Apply the Test

One telling example of how the ‘clear and present danger’ test has been applied in Hungary is the Hegedus Jr. case, although the lower court, the Municipal Court of Budapest, did not apply the ‘clear and present danger’ test. Hegedus Jr., a

\textsuperscript{107} For Dworkin’s distinction between the instrumental and constitutive justification for freedom of speech see n. 11 above, 199–202.

\textsuperscript{108} Ibid., 200.


\textsuperscript{111} See n. 40 above, 15–7.
Protestant (Reformed Church) minister, was prosecuted for an article, titled *Christian Hungarian State*, in which he, in unmistakable code words, called for the exclusion of Jewish people from Hungarian society:

... as a result of the self-renunciation of the Compromise of 1867, the hordes of the vagabonds of Galicia had invaded it; who, as if they were the old self of man without salvation, in an ancient onslaught fretted and are still scrunching this homeland, which, despite all this, is capable of resurrection from its ruins, on the heaps of the bones of our heroes. With their Sion of the Old Testament lost because of their sins and rebellions against God, let the most promising eminence of the moral order of the New Testament, the Hungarian Sion be irretrievably perished.

... And because it is not possible to burn out every single Palestinian from the banks of river Jordan with Fascist methods very often surpassing even those of the Nazis, they come to the banks of the Danube, sometimes as internationalists, sometimes as nationalists, and sometimes as cosmopolitans, to kick into the Hungarians once again, because they feel like it.

They become hysterical even from the salutation: CHRISTIAN HUNGARIAN STATE.

They say: it is exclusion...

Now let you Hungarians listen to the one single message of survival over the thousandth year of the Christian Hungarian state, which has been based on the ancestral inheritance and continuity of right: EXCLUDE THEM! FOR IF YOU DO NOT EXCLUDE THEM, THEY WILL EXCLUDE YOU!

Of this message we are warned by the misery of thousand years, by the inheritance nevertheless existing 'high above' of our country that has been robbed and looted a thousand times, and last but not least by the stone-throwing sons of Ramallah.

The article was published in 2001, in 12,000 copies in a Budapest district newspaper of the then parliamentary Hungarian Life and Justice Party of which Hegedus Jr. was vice president, as well as member of Parliament. The Municipal Court of Budapest sentenced Hegedus Jr. to imprisonment for a period of one year and six months (suspended to probation for three years). But the Municipal High Court of Appeal of Budapest acquitted Hegedus Jr., and the reasoning of the two courts illustrates very different applications of Decision 30/1992. The Municipal Court of Budapest recalled that the exclusion of Jewish people from

112 This historic agreement, called *Compromise*, created the Austro-Hungarian Monarchy in 1867. The 'liberalism of the dualistic era', as Peter Hanak characterizes it, the 'good old years', as people in Hungary remembered this period that lasted for half of a century, ended with the dissolution of the monarchy in 1918. See n. 15 above, 165. See also O. Jasti, *The Dissolution of the Habsburg Monarchy* (Chicago: Univ Chicago Press, 1929) (n. 19 above), 13–86.


114 Municipal Court of Budapest Case No. 13.B.423/2002/7 in ibid.


Hungarian society in fact took place by formally legitimate anti-Jewish laws in Hungary between 1938 and 1945. The Municipal Court stated:

The final aim of this article was, and the accused was aware of it, that the aroused hatred might as well erupt from the enclosed world of emotions and manifest itself for others. This conduct constitutes and qualifies as incitement against the community as stated in the statutory provision in Article 269. b) of the Hungarian Criminal Code.  

The Municipal Court of Budapest did not find that the article had to create a clear and present danger in order to constitute the crime of the incitement to hatred. But the Municipal High Court of Appeal of Budapest, relying on the decisions of the Constitutional Court, took a sharply different approach, requiring the clear and present danger of violence as a precondition to finding that incitement to hatred existed. The Municipal High Court of Appeal of Budapest stated that the lower Municipal Court of Budapest 'failed to address the extent of the danger', and held that incitement of hatred should be construed, following the reasoning of the Constitutional Court and the related case decisions of the Supreme Court as:

...the person who
-calls to violent acts,
-calls to the performance of such an action or conduct, where
-the danger is not only assumed but there are actual rights endangered and there is a direct threat of a violent act,

is deemed not as someone who exercises the right to the freedom of expression of opinion, but one who commits incitement to hatred.

The acquittal of Hegedus Jr. prompted Parliament to amend the relevant provision of the Criminal Code to extend the criminal restriction on ‘hate speech’. This led to the third related decision of the Constitutional Court in 2004. In this way, indirectly, the Constitutional Court became involved in the case. Sajó, besides criticizing the acquittal of Hegedus Jr., calls attention to the fact that:

...ordinary courts became very reluctant to apply the incitement to hatred provisions. The prosecution does not find it applicable to anti-Semitic chants at football games (such as ‘the trains are ready for Auschwitz’) ... The terms ‘exclude them’ were identical to those used in the preparation of race laws of the Hungarian fascist regime. This was found to fall outside Article 269 because of the lack of a clear and present danger. It was argued that in

117 The Municipal Court of Budapest mentions Act No. IV of 1939 on the limitation of the social and economic expansion of the Jews and Act No. VIII of 1942 on the regulation of the legal status of the Israelite denomination in ibid., 331.
the current political situation one can rule out that such statements will result in the use of legislation covering racial discrimination.122

The reluctance of the prosecution to apply the incitement to hatred provisions to antisemitic chants at football games precludes such racist speech from even becoming a court case. It shows that instead of repeatedly enacting stricter laws that would be found unconstitutional by the Constitutional Court,123 proper application of the crime of incitement to hatred should become part of the fight against ‘hate speech’. The article of the racist cleric might or might not fall under Article 269 of the Criminal Code, and this question is still unresolved in Hungary.124 But antisemitic chants at football stadium gatherings should be prosecuted and sentenced under the Criminal Code. These are clear-cut crimes even if we follow the most narrowly tailored approach of the Hungarian Civil Liberties Union, the first organization on earth that copied its English name from the name of the American Civil Liberties Union:

...when an agitated crowd is incited to violent action, and the potential victim is on the scene, then the danger that the speech is followed by violent action is clear and present. When, however, a speaker addresses indifferent passers-by, who are hurrying about to do their business, and the potential scapegoat is not present, the danger is negligible.125

The lack of proper application of the narrowly tailored criminal prohibition is connected to the lack of overall political condemnation of racist speech. Jean-Yves Camus paints a rather dark picture on the political atmosphere in Hungary. As he describes:

...[a] distinctive feature of the situation in Hungary is that anti-Semitism is also considered perfectly respectable on newsstands, where the MIEP’s126 monthly ‘Magyar Forum’127 is on sale. The list of books available by mail order from the newspaper in 2003–2004 is undoubtedly unique in Europe, since it offers books applauding the

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122 ‘Background Paper IV: The Legislative Framework and Judicial Review Concerning Racist and Discriminatory Expression in a Selected Number of European Countries’, Combating Racism While Respecting Freedom of Expression (Council of Europe: European Commission against Racism and Intolerance, 2007), 141.
123 In February 2008, the Parliament accepted a new amendment of the Criminal Code, trying again to define ‘hate speech’ and to prohibit it on the basis of its content. László Sólyom, the President of the Republic of Hungary, the first Chief Justice of the Constitutional Court, one of the authors of Decision 30/1992, found that the new law would be unconstitutional and, before signing the bill, he sent it to the Constitutional Court and initiated its previous constitutional review. In July 2008, the Constitutional Court held the bill unconstitutional. Decision 95/2008 (VII. 3.) AB.
124 An important part of the debate is to what extent it has to be taken into consideration that Hegedus Jr., and other Parliamentarians represented in Parliament the extreme right wing Hungarian Life and Justice Party when the article was published.
125 See n. 101 above.
126 MIEP is the acronym of the Hungarian Life and Justice Party in Hungarian.
Hungarian Waffen SS . . . a negationist book on Auschwitz and a translation of a 1930s French classic on the judeo-masonic plot theory—many of them illustrated by drawings and caricatures like those produced by the Nazi Stürmer.128

(iii) The Prohibition of the Public Display of Certain Totalitarian Symbols

Riots on the streets of Budapest on the 50th anniversary of the anti-Stalinist revolution in 1956 provided a convincing example for the argument that even unfettered racist speech can contribute to democratic public opinion. On 24 October, the New York Times in the centre of its front page displayed a photograph of the street riots on 23 October, the starting day of the revolution. The photograph focused on a demonstrator whose face was distorted by hate and who was holding a huge red and white striped flag. The article that followed did not mention the flag. No doubt, the overwhelming majority of the readers did not know what kind of flag was in the picture. Perhaps, many of them thought that it was the Hungarian national flag. The readers of the New York Times were able to learn about the flag two days later from a short, scarcely noticeable letter to the editor that many readers probably missed, written by István Déák, a Hungarian emeritus professor of history at Columbia University:

Your caption did not mention that the demonstrator pictured in the foreground is not waving the Hungarian flag but the striped, so-called Arpad flag of the Arrow Cross, Hungary’s extreme National Socialist party.

The Arrow Cross was in power for a few months beginning in October 1944, during which time Hungary was devastated by the war and thousands of Jews were rounded up and killed.

During the recent demonstrations in Budapest, the flag of the Hungarian Nazis has been conspicuous.129

This example is not about a mistake even the best newspapers can make when they fail to provide an accurate description of the relevant historical-cultural background of an event. The story of this photo is an instance of coded racism. It had to be coded, because in Hungary, the criminal law prohibits the public display of certain listed totalitarian symbols, among them the swastika and the arrow cross. The Constitutional Court took this provision of the Criminal Code as an exception, holding it constitutional with the thoroughly unconvincing argument that symbols are such special forms of expression that they can trigger specific criminal prohibition.130 Section 269/B of the Criminal Code says that:

128 See n. 64 above, 38.
(1) Anyone who
   a) distributes;
   b) uses in front of a large public gathering;
   c) exhibits in public a swastika, the SS sign, an arrow-cross, the hammer and sickle, a five-pointed red star or a symbol depicting the above commits a misdemeanour—unless a graver crime is realised—and shall be punishable by fine.

(2) The person who commits an act defined in paragraph (1) for the purposes of disseminating knowledge, education, science, or art, or for the purpose of information about the events of history or the present time shall not be punishable.131

Consequently, extreme right demonstrators could not have displayed the arrow cross or the swastika, or the red and white striped flag with an arrow cross on it: the flag of the Arrow Cross, the Hungarian Nazi Party. They can only use a red and white striped flag without the arrow cross on it. The Federation of Young Democrats—Civic Alliance, the leading right-wing party, after a short hesitation endorsed the use of the striped flag stating that it is just a historical Hungarian flag. But while some versions of the red and white striped flag are historic Hungarian flags indeed, the flag became strongly associated with the Arrow Cross Party. Since 1944–45, the flag has been a symbol of the most horrible terror and cannot be separated from this meaning.132

The criminal prohibition of the public display of certain totalitarian symbols could not stop the use of a similar totalitarian symbol. The exceptional content-based criminal law ban on symbolic speech led to coded racist speech in Hungary. It deprived the global community of the opportunity to understand a profound aspect of the reported political turmoil in a post-Holocaust, post-communist, Central-European democracy. The result of the regulation is that most non-Hungarian foreigners could not decode the message of the flag that they saw on the front page of one of the world’s most respected newspapers.

Endorsing the use of the striped flag at anti-government demonstrations133 by the Federation of Young Democrats—Civic Alliance provides a clear example of coded speech that is hard to understand abroad. This makes it much easier for the leading right-wing party of Hungary to engage in doublespeak, using democratic language when talking to foreigners, while mixing with extreme right groups and ideas when talking to a domestic audience. As this illustration shows, limiting

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131 Act XLV of 1993 on the amendment of Act IV of 1978 on the Criminal Code introduced this provision into the Criminal Code under the title ‘Use of Symbols of Despotism’.

132 The failure to accept that the red and white striped flag cannot be separated from the terror it symbolizes is somewhat similar to the continued public display of the confederate flag (the flag of the Confederacy organized by the Southern states in 1861) that cannot be separated from slavery in the US.

133 László Sólyom, the President of the Republic of Hungary, in a speech he gave at the opening meeting of the autumn sessions of Parliament on 10 September, 2007, at least asked demonstrators ‘to respect the victims and the pain of the survivors by not using this flag as a symbol, to be humane, to think about what they cause with this’.
public discourse by prohibiting totalitarian symbols significantly contributed to the spread of racist speech instead of reducing it.

4. Conclusion

I have always been convinced that freedom of speech in new democracies needs the maximum protection in order to overcome the long history of suppression and the fear of speaking freely.\textsuperscript{134} As the HCLU argues:

when democratic institutions work well, and the people who fill the main institutional roles are united in rejecting antidemocratic radicalism, extremism has no appeal beyond a very limited section of the public. It is indeed imperative to take resolute action against racism, but that should not be done with instruments of the penal law in the first place.\textsuperscript{135}

Through my personal experiences as a lawmaker in the first two terms of the freely elected post-communist parliament of the Republic of Hungary in the 1990s, I became persuaded that legislation has a limited capacity to change the mindset of a political community that had lived under dictatorship for long decades. I also learned that only carefully planned law and policy can enable the political community to develop the culture of liberal constitutional democracy in the fastest way possible.

Instead of repeatedly questioning the Hungarian ‘clear and present danger’ test, efforts against ‘hate speech’ should focus on the single most important remedy: education that can fight ignorance and prejudice, the roots of hatred. In addition, clear-cut political condemnation of racist speech and other expressions of hatred, combined with a proper application of the criminal law prohibition of incitement to hatred could at least to some extent enable the political community to build a healthier society.

Hungary, as a case study, also shows that each country has to choose the best anti-‘hate speech’ policy for itself. Instead of taking for granted that in the constitutional treatment of ‘hate speech’ there is a deep divide between the US and all other countries, it would be more helpful to look openly at possible policy directions. The constitutional prohibition of content-based regulation of ‘hate speech’ can be useful outside the US as well. In each case, the law has to be carefully designed to include all available substantive safeguards that facilitate the constitutional application of the statute. All possible procedural safeguards should be also employed, such as the one in Canada where in instances of alleged hate speech ‘…no prosecution may be initiated without the consent of the Attorney


\textsuperscript{135} See n. 102 above, 3.
Lack of content-based regulation should not mean that even incitement to hatred that creates the imminent danger of violence is not prosecuted. Content-based regulation should be as narrowly tailored and applied as possible and should build on all the best practices that have been developed to at least reduce the likelihood of the misuse of the ‘hate speech’ law to suppress political dissent. International organizations should review their policies to take into consideration that the weaker a democracy, the more likely the abuse of a content-based ‘hate speech’ law. The United Kingdom is certainly an established democracy, but as Nadine Strossen writes about the controversial application of the British Race Relations Act of 1965: ‘In perhaps the ultimate irony, this statute, which was intended to restrain the neo-Nazi National Front, instead has barred expression by the Anti-Nazi League.’ The same content-based ban, even if it is not abused in established democracies, might be easily abused in rather fragile ones.

