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Hate Speech and Constitutional Democracy in Eastern Europe: Transitional and Militant? (Czech Republic, Hungary and Poland)

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This article departs from the normative assumptions about the status of militant democracy in transitional countries, while drawing on the constitutional appraisal of free speech and non-discrimination in Central and Eastern Europe during the period 1990–2012. It explores two models ('American' and 'European') of legal engagement with hate speech, targeting this recurrent constitutional theme to trace the militant in the transitional discourse on freedom of expression. The study scrutinises the legislative framework and the adjudication of the higher courts (constitutional, supreme and appellate courts) in three selected countries of Central and Eastern Europe – the Czech Republic, Hungary and Poland – in an effort to address the dearth of literature in the English language on hate speech laws and policies in these jurisdictions. The author concludes that the discourse on transitional democracy in this post-communist constitutionalism has been substantially constructed as a form of militant democracy, despite some visible influence of the American free speech narrative.

Keywords: freedom of expression, hate speech, transitional democracy, militant democracy, Central and Eastern Europe

1. Introducing the Subject of Free Speech and Democracy in Central and Eastern Europe: Transitional and Militant?

> 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.[1]

One of the most fascinating aspects of constitutional design in transitional societies is the relationship between the concepts of *transitional justice* and *militant democracy*. Ever since the Germanic concept of militant democracy (*streitbare Demokratie*)[2] was powerfully coined

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[1] András Sajó, *Freedom of Expression* (Institute of Public Affairs 2004) 128.

[2] Militant democracy (*streitbare Demokratie*) is a popular Germanic concept, designed as a remedy to prevent a repeat of the Weimar Republic's failure to react effectively to an authoritarian threat to a free democratic order

in the English-speaking literature by Karl Loewenstein (1891–1973),[3] it has remained an issue of extensive debate: to what degree should the constitutional democracies – who overcame the unsavoury past of the *anciens régimes* – limit individual liberties through preventive legal restrictions?[4] The focus of this debate in comparative constitutional law has chiefly been on the dilemma of hate speech and freedom of expression. It is clear that authoritarian regimes are not necessarily brought to power by violence, but rather by the emotionalism that manipulates public opinion through xenophobic rhetoric and the demonisation of minorities.[5] Nonetheless, can a liberal democracy afford the unavoidable shortcomings of censorship for the sake of a more protected democratic governance? In the course of the last century, this question has been answered in strikingly different ways by various Western judiciaries, offering the somewhat libertarian ('American', or more specifically 'USA') free speech model and the more balanced ('Western European') paradigm to constitutional thought on freedom of expression.

The *transitional democracy* paradigm emerged in the context of the United States' promotion of democracy in the 1980s. It is based on the assumption of a certain trajectory recumbent between authoritarianism and a truly consolidated democracy.[6] This trajectory underscores the process of democratic consolidation and the promotion of liberalism, covering several waves of democratisation, including (but not limited to) the post-authoritarian transition in southern Europe in the mid-1970s, the replacement of military dictatorships in Latin America in the late 1970s through to the late 1980s, the collapse of communism in Central and Eastern Europe (CEE), or the most recent wave led by the 'Arab Spring', to name but a few.[7]

This article picks up the idea of transitional democracy to unpack the genesis and evolution of Central and Eastern European constitutionalism in the last two post-communist decades,[8] assuming a specific sensitivity for transitional democracies to the importation of relevant constitutional

(*freiheitlich-demokratische Grundordnung*). In line with this approach, hate speech should be excluded from the scope of the freedom of speech protection as it threatens the very foundations of democracy.

[3] Karl Loewenstein, 'Militant Democracy and Fundamental Rights' (1937) 31 *American Political Science Review* 638. He identified a set of measures, undertaken by European governments to counter extremist threats (645–55). In the post-war period, the German Constitutional Court has further developed the concept of *streitbare Demokratie* as the ethical core of its judicial narrative.

[4] On the genesis and constitutional implications of the concept, see Augustin Simard, 'L'échec de la constitution de Weimar et les origins de la "démocratie militante" en R.F.A.' (2008) 1 *Jus Politicum: Revue de Droit Politique*, http://www.juspoliticum.com/L-echec-de-la-Constitution-de,29.html; Otto Pfersmann, 'Shaping Militant Democracy: Legal Limits to Democratic Stability' in András Sajó (ed), *Militant Democracy* (Eleven International 2004) 47, 47–60.

[5] See András Sajó, 'Militant Democracy and Emotional Politics' (2012) 19 *Constellations* 562.

[6] For an extensive account of the concept, see Ruti G Teitel, *Transitional Justice* (Oxford University Press 2000).

[7] For a critical outlook of the transitional democracy paradigm, arguing for an alternative lens on democratisation, see Thomas Carothers, 'The End of the Transition Paradigm' (2002) 13 *Journal of Democracy* 5; Thomas Carothers, 'How Democracies Emerge: The "Sequencing" Fallacy' (2007) 18 *Journal of Democracy* 12. For a broader normative exposure of different transitional models of democracy (including CEE), see Jiří Přibáň, 'Varieties of Transition from Authoritarianism to Democracy' (2012) 8 *Annual Review of Law and Social Science* 105.

[8] For a study of 'transitional arguments' invoked by CEE at the European Court of Human Rights (ECtHR), see James A Sweeney, *The European Court of Human Rights in the Post-Cold War Era: Universality in Transition* (Routledge 2013) (in particular at 155–58, dealing with the transitional arguments by the respondent states with regard to freedom of expression).

models. It appears that the American-fashioned rhetoric of 'transition' has been integrated into the intellectual reflection on post-communist law in CEE from the early 1990s to the 2000s, both in academic writing[9] and the narrative of human rights organisations and think tanks.[10]

In normative terms, this article offers an insight into the intimate and not necessarily antagonistic correlation between 'transitional' and 'militant' concepts of democracy, through the looking glass of 'hate speech' in post-communist CEE.[11] Therefore, the discussion on the limits of free speech draws from the Western debate on the scope of the hate speech exception to the right of freedom of expression, with its radical divide between European (restrictive, arguably more 'militant') and US-American ('permissive') approaches.[12] These approaches essentially offer the opposite constitutional solutions to the hate speech problem in transitional democracies, in terms of either limiting the constitutional right of freedom of expression (in the European fashion) or extending it to cover hate speech (following the US approach).[13] Furthermore, the discussion about hate speech vis-à-vis freedom of speech is often drawn under the paradigm of the universal (United Nations) human rights protection system. Both the International Covenant on Civil and Political Rights[14] (Article 20) and the International Convention on the Elimination of All Forms of Racial Discrimination[15] (Article 4) are referred to as primary sources of the international legal obligation of states to counteract

[9] See, for example, Attila Ágh, 'The Transition to Democracy in Central Europe: A Comparative View' (1991) 11 *Journal of Public Policy* 133; Antal Visegrády, 'Transition to Democracy in Central and Eastern Europe: Experiences of a Model Country – Hungary' (1992) 1 *William and Mary Bill of Rights Journal* 245; Helga A Welsh, 'Political Transition Processes in Central and Eastern Europe' (1994) 26 *Comparative Politics* 379; Alberto Febbrajo and Wojciech Sadurski (eds), *Central and Eastern Europe after Transition: Towards a New Socio-Legal Semantics* (Ashgate 2010). In the free speech context, see Gábor Kardos, 'Freedom of Speech in the Time of Transition' (1993) 8 *Connecticut Journal of International Law* 529.

[10] See, for example, Sandra Coliver and Patrick Merloe, *Guidelines for Election Broadcasting in Transitional Democracies* (Article 19 1994); Pavol Demeš, *Twenty Years of Western Democracy Assistance in Central and Eastern Europe* (International Institute for Democracy and Electoral Assistance 2010).

[11] For a broader analysis of the militant concept in transitional democracies, see Sajó (n 1).

[12] The contrasts and similarities between free speech concepts in the US and Europe are well documented. For a detailed analysis of differences between European and American approaches to hate speech, see Uladzislau Belavusau, 'Judicial Epistemology of Free Speech through Ancient Lenses' (2010) 23 *International Journal for the Semiotics of Law* 165; Michel Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2002) 24 *Cardozo Law Review* 1523. For a recent contribution with a critique of the US approach (considering pro-ban arguments that primarily concern the social impact of hate speech towards its victims) see Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press 2012).

[13] Unlike in continental Europe, the approach of the US Supreme Court has enfolded hate speech into the protective scope of the First Amendment (eg, *Brandenburg v Ohio*, 395 US 444 (1969); *Whitney v California*, 274 US 357 (1927); *RAV v City St Paul*, 505 US 377 (1992); *Snyder v Phelps*, 09-751 562 US (2011)). On the opposite side, the ECtHR has systematically found the restriction of hate speech by states compatible with limitations on freedom of expression, prescribed in the European Convention on Human Rights (ECHR), art 10(2) (eg, *Kühnen v Federal Republic of Germany* App No 12194/86 (ECtHR, 1988); *Soulas v France* App No 15948/03 (ECtHR, 2008); *Leroy v France* App No 36109/03 (ECtHR, 2008); *Balsytė-Lideikienė v Lithuania* App No 72596/01 (ECtHR, 2008); *Féret v Belgium* App No 15615/07 (ECtHR, 2009); *Vejdeland v Sweden* App No 1813/07 (ECtHR 2012)). This constitutes perhaps the most striking discrepancy between the two principal Western free speech models.

[14] International Covenant on Civil and Political Rights (entered into force 23 March 1976) 999 UNTS 171.

[15] International Convention on the Elimination of All Forms of Racial Discrimination (entered into force 4 January 1969) 660 UNTS 195.

hate speech.[16] Similarly, the European framework for combating hate speech nowadays transcends the instruments of the Council of Europe and jurisprudence of the European Court of Human Rights, encompassing European Union (EU) law.[17]

Since the end of the Second World War, constitutional review has gained considerable success in paving the way for the global model of constitutional rights, characterised by an extremely broad approach to the scope of rights, possible obligations and the use of the doctrines of balancing and proportionality to determine the permissible limitations of these rights.[18] The development of a coherent balancing test (in the United States) and a proportionality test (in Europe)[19] has been pivotal for the importation of Western constitutional ideas into the transitional countries of CEE.[20] To explore the scope of this importation, the survey builds on the socio-legal developments in the Czech Republic, Hungary and Poland, embracing the last 20 years of post-communist transition.

The omnipresence of censorship in the communist period[21] explains why the formulation of the right of freedom of expression in CEE constitutional texts is construed either as synonymous with the prohibition of censorship or explicitly mainstreaming media pluralism.[22] This strong anti-censorship ethos, along with an emphasis on media pluralism, is a novelty for transition democracies, where a 'toothless' right of freedom of speech had been proclaimed earlier in the communist constitutional texts. Similarly, the idea of possible limitation was not new. An act of 'incitement against a community' already existed but had been politically misused in the criminal codes of the communist era. It is not surprising that in its earlier post-communist decisions on the freedom of expression (mostly dealing with state monopolies, pluralism and

[16] Because of the limits of the article, it focuses exclusively on the influence of comparative jurisprudence ('European' and 'American' models) in the selected countries. The impact of the United Nations (UN) mechanism (in particular, the investigation into the reports of the Universal Periodic Review of the Human Rights Council and Committee on the Elimination of Racial Discrimination) will require different research.

[17] At the level of the European Union (EU), states (including the three countries under consideration) are obliged to implement the EU Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, [2008] OJ L 328/55. For the EU approach to hate speech, see Uladzislau Belavusau, 'Fighting Hate Speech through EU Law' (2012) 4 *Amsterdam Law Forum* 20. For a critique of the EU Council Decision, see Uladzislau Belavusau, 'Historical Revisionism in Comparative Perspective: Law, Politics, and Surrogate Mourning', EUI Working Paper, 2013, 12 (in particular 12–16).

[18] See Kai Möller, *The Global Model of Constitutional Rights* (Oxford University Press 2012).

[19] For a convincing assessment of proportionality and balancing, see a series of remarkable works by Israeli scholars, Moshe Cohen-Eliya and Iddo Porat, 'Proportionality and the Culture of Justification' (2011) 59 *American Journal of Comparative Law* 463, and 'American Balancing and German Proportionality: The Historical Origins' (2010) 8 *International Journal of Constitutional Law* 263.

[20] For an exemplary study, see Catherine Dupré, *Importing the Law in the Post-Communist Traditions: The Hungarian Constitutional Court and the Right to Human Dignity* (Hart 2003).

[21] See A Ross Johnson and R Eugene Parta (eds), *Cold War Broadcasting – Impact on the Soviet Union and Eastern Europe: A Collection of Studies and Documents* (Central European University Press 2010); Mary Heimann, *Czechoslovakia: The State that Failed* (Yale University Press 2009) particularly at 189–90; Mihály Szegedy-Maszák, 'The Introduction of Communist Censorship in Hungary: 1945–49' in Marcel Cornis-Pope and John Neubauer (eds), *History of the Literary Cultures of East-Central Europe: Junctures and Disjunctures in the 19th and 20th Centuries* (Vol 3, John Benjamins 2004) 114.

[22] Constitution of the Republic of Poland, art 14; Constitution of the Republic of Hungary, art 61 (replaced recently by the new Fundamental Law, adopted under the Fidesz government); Charter of Fundamental Rights and Freedoms of the Czech Republic, art 17.

defamation of politicians), the constitutional courts stressed the ideological neutrality of constitutional texts and emphasised that freedom of expression was subject only to other limits on the rights of others.[23]

Furthermore, these three CEE countries shelter multiple minorities, constituting the relics of grand multinational empires and often resulting from the ad hoc design of national borders after the Second World War. Moreover, romantic nationalism in these countries spread later than it did in Western Europe and is still persistent to an impressive extent.[24] This explains one of the main specificities of the hate speech problem in CEE. Jews, Roma, LGBT persons and national minorities affiliated to neighbouring countries are the primary targets of virulent hate speech attacks. Other specific problems stem from the communist heritage, such as the debate on the prohibition of communist propaganda and symbolic attributes, considering the ongoing presence of 'nostalgic' political movements.[25]

It would be impossible to provide details of all the notorious instances of hate speech occurring in the Czech Republic, Hungary and Poland. The practical goal of this article is somewhat different. Apart from tracing the role of the militant in the transitional constitutional realm, I shall identify the legal recourses available to combat the phenomenon of hate speech. This exercise does not necessarily aim to undermine the libertarian American model or normatively justify the pertinence of European-style militant discourse. My ambition for this study is rather to illuminate the legal and judicial framework for protection that has emerged for social movements in these countries during the last 20 years since the fall of communism. To this end, an analysis of legislation and the case law of the courts in the countries under consideration will be coupled with insights from the reports of the European Commission against Racism and Intolerance (ECRI), as well as with various documentation produced by local non-governmental organisations (NGOs) and scholars of discrimination.

What unites CEE perspectives on freedom of expression and non-discrimination are certain experiences of the relatively late nation-building, the communist legacies, the ethos of the 'return to the Western cradle', as well as a series of law reforms before and after the EU's 'eastward' enlargement that these countries have all undergone. A certain historical and socio-legal proximity in the roots and aspects of the hate speech phenomenon in the region also motivate a similar pattern for my analysis. Scrutiny of each country will begin with an appraisal of the socio-historical context of hate speech production, and with an overview of the legal instruments that structure the debate over the problem. I will then proceed to examine the adjudication by the constitutional and other relevant higher courts. In the conclusions, I will summarise the role of the militant narrative, deduce the framework available for protection against hate speech,

[23] This idea is particularly pronounced in the decisions of the Hungarian Constitutional Court. See László Sólyom and Georg Brunner, *Constitutional Judiciary in a New Democracy* (University of Michigan Press 2000) 11.
[24] See Serhiy Bilenky, *Romantic Nationalism in Eastern Europe: Russian, Polish, and Ukrainian Political Imaginations* (Stanford University Press 2012).
[25] In this respect, it is important to underline that combating hate speech is structurally different from the ban on democracy-destructing movements. Yet, as will be exposed further in the article, those movements often act as the most vigorous producers of hate speech.

and explain why the hate speech provisions are generally under-enforced in the transitional countries under consideration.

2. The Czech Republic

2.1 The Social and Historical Background

The Czech Republic (comprising the historic lands of Bohemia, Moravia and Silesia) is a descendant of the Austro-Hungarian Empire, and remained strongly germanised under Habsburg rule for centuries. Peacefully separated from Slovakia, the country has existed de jure within its present borders since 1993. Further historical factors also explain the contemporary national composition of the Czech Republic and the specificities of nationalist discourse. The historically large Jewish and Roma minorities were tragically wiped out during the Nazi occupation, while a significant German minority was either deported or had escaped from the country after the Second World War. In the contemporary Czech Republic and its ten million-strong population, Roma and Germans constitute the largest minority groups. Other ethnic minorities include Poles, Ruthenians (Rusyns) and Hungarians.[26]

2.2 The Legislative Framework

In its 2009 report, the European Commission against Racism and Intolerance noted that 'there is still no comprehensive anti-discrimination legislation in force in the Czech Republic'.[27] At the same time, the Commission suggested that the Czech Charter of Fundamental Rights and Freedoms[28] does not appear to provide effective protection against racial discrimination. On 17 June 2009 the Czech Republic adopted anti-discrimination legislation, which guarantees the right to equal treatment and bans discrimination in such areas as access to employment, business, education, healthcare and social security on the grounds of sex, age, disability, race, ethnic origin, nationality, sexual orientation, religious affiliation and faith or worldview. The last-minute passing of the Anti-Discrimination Act[29] by the Czech Chamber of Deputies was a

[26] Those minorities enjoy 'officially recognised' status, according to the Charter of the Council of the Government Council for National Minorities (15 June 2005) http://www.vlada.cz/assets/ppov/rnm/statut-rnm-en.pdf. During recent years there has been an ongoing debate over extending the list of officially recognised minorities to Belarusians and Vietnamese: see Oldřich Danda, 'Uznání Vietnamců za menšinu mohou zhatit obchody s drogami', *Novinky.cz*, 28 March 2013, http://www.novinky.cz/domaci/297411-uznani-vietnamcu-za-mensinu-mohou-zhatit-obchody-s-drogami.html. As of late 2013, there are 14 officially recognised minorities in the Czech Republic (Belarusians, Bulgarians, Croatians, Hungarians, Germans, Greeks, Poles, Roma, Russians, Rusyns, Serbians, Slovaks, Vietnamese and Ukrainians).

[27] European Commission against Racism and Intolerance (ECRI), 'ECRI Report on the Czech Republic (Fourth Monitoring Cycle)' 15 September 2009, 8.

[28] The Czech Constitution does not include a list of human rights. Therefore, the Charter itself forms part of the constitutional legal order.

[29] Law 198/2009 on Equal Treatment and Legal Protection against Discrimination and Amending Certain Laws (Non-Discrimination Law).

necessary step to avoid legal proceedings by the European Commission for failing to implement the obligations contained in the EU 'Race Equality' Directive[30] and the 'Employment Equality' Directive.[31]

The Czech Republic has signed but not ratified Protocol 12 of the European Convention on Human Rights,[32] an important anti-discrimination instrument of the Council of Europe (as of October 2013, it has 18 parties and 19 signatories), which makes the non-discrimination provision of the Convention free-standing. Similarly, it has neither signed nor ratified the Additional Protocol to the Convention on Cybercrime,[33] concerning the criminalisation of acts of a racist or xenophobic nature committed through computer systems. The non-recognition of corporate criminal liability in domestic law prevents ratification of this Convention, without which the Additional Protocol cannot be ratified.

In 2010, a new Criminal Code (*Trestní zákoník*, enacted in 2009) came into force, strengthening 'militant' aspects. The case law described in this article was based on the provisions of the previous 1961 Code, which are essentially similar on the issues of hate speech. Section 42(b) of the new Code details hate crimes explicitly.[34] Racist motivations remain a specific aggravating circumstance that judges are required to take into account when sentencing offenders (section 42(b)). The additional aggravating circumstances have been added for a number of offences, where the commission of an offence is motivated by real or perceived race, ethnicity, nationality, religious or political convictions, or real or perceived lack of religious belief. Section 352 prohibits violence against a group of inhabitants and individuals.

The clauses on pure hate speech are provided by sections 355 and 356. The former prohibits the defamation of a nation, race, ethnic or other group of persons on grounds, inter alia, of an individual's or group's real or perceived race, or membership of an ethnic group, nationality, or political or religious convictions, or lack thereof. Under the terms of this provision, racist motivations may be considered as an aggravating circumstance only in relation to the media (referring to situations where the offence is committed through the press, film, radio, television, a publicly accessible computer network or other similarly effective means). In contrast, section 356 does not link 'hateful' utterances to any particular forum, and prohibits incitement to racial, national, ethnic, class or religious hatred and the promotion of restrictions on human rights and

[30] Council Directive 2000/43/EC of 19 July 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, [2000] OJ L 180/22.
[31] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303/16.
[32] Protocol No 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, CETS 177.
[33] Additional Protocol to the Convention on Cybercrime, concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed through Computer Systems (entered into force 1 March 2006) ETS 189.
[34] From criminal practice, it should be understood as hate-aggravated offences of murder, grievous bodily harm, bodily harm, torture and other inhuman and cruel treatment, false imprisonment, unlawful restraint, kidnapping, blackmail, breach of secrecy of documents held in private, damage to private property, abuse of the authority of an official, violence against a group of persons and against an individual, as well as some military offences. For an exemplified analysis, see Klára Kalibová (ed), *Zpráva o násilí z nenávisti v České republice za rok 2011* (In Iustitia 2012).

freedoms. The Code provides for a two-year prison term upon conviction. Section 356 of the Czech Criminal Code thus sets an explicit content-based restriction on freedom of expression.

Moreover, under section 403 the establishment, support, promotion or publicising of a movement that aims to suppress the rights and freedoms of individuals is prohibited. The commission of this offence through a publicly accessible computer network has been added as an aggravating circumstance (*přitěžující okolnost*). In addition, section 404 prohibits demonstrations of sympathy with such movements.

The 2009 Report of the European Commission against Racism and Intolerance includes reference to the Right of Assembly Act No 84/1990, which enables the authorities to stop an otherwise lawful demonstration immediately if illegal activities occur. From the strict standpoint of censorship and the right to free association, this is a fairly contestable measure. The rule has been applied successfully in the past to disperse a neo-Nazi parade at which racist slogans were chanted. However, this Act has not avoided the scrutiny of the Constitutional Court. Previously, the Act left a wide margin of action for officials, envisaging that a planned event should be prohibited within three days of receiving notification of the event. The Supreme Administrative Court (*Nejvyšší správní soud*) has examined the banning by the Mayor of Plzeň of a march that had been approved by a lower authority a month earlier.[35]

2.3 The Constitutional Court

Interestingly, the first and only decision on freedom of speech in the brief history of the Czechoslovak Constitutional Court (which had existed for less than a year in 1992 when it was succeeded by the Czech and Slovak Constitutional Courts) addressed the problem of hate speech, stemming from sections 260 and 261 of the Criminal Code 1961.[36] In the recent Criminal Code of 2009, these clauses correspond to the somewhat modified formulations in sections 355 and 356, described above (see Section 2.2). The earlier Criminal Code embraced those clauses under the reference of 'support and promotion aimed at suppressing human rights and freedoms' (*podpora a propagace hnutí směřujících k potlačení práv a svobod člověka*).

The 1992 case started as a petition by a group of 52 members of parliament who challenged the conformity of sections 260 and 261 of the Criminal Code (amended in 1991) with constitutional texts and international instruments. The amendment brought communist propaganda within the scope of hate speech.[37] The petitioners claimed first that the clauses were incompatible with the principle of *nullum crimen sine lege*. On the one hand, the term 'communism' was not precisely defined in the Code or elsewhere; on the other hand, such definition constitutes an

[35] See Supreme Administrative Court (NSS), 57 6/2008-32, 1 February 2008. ECRI Report on the Czech Republic (n 27) 16: 'Some local authorities, as well as many civil society actors, consider that the three-day rule itself, or at least the manner in which it is presently applied, is too strict to allow effective action to be taken to prevent neo-Nazi or other public gatherings at which racist discourse or actions that are in breach of the law can be expected.'

[36] Constitutional Court (CC) 5/92, 4 September 1992.

[37] Act No 557/1991 Amending and Supplementing the Criminal Code.

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absolute prerequisite for the criminalisation of conduct consisting of the support or propagation of communism. Consequently, the restriction of the freedom of expression in question exceeded the bounds of permissible limitations. Furthermore, the petitioners claimed that it was impossible for other state and public bodies or public law institutions to apply this criminal law prohibition.

The Constitutional Court did not support the petitioners' claim that, by adopting sections 260 and 261, the state had bound itself to an exclusive ideology. It saw no reason to conclude that only a certain ideology was being allowed to express itself merely because the law criminalised fascist and communist movements that were explicitly directed at the suppression of civil rights or at the declaration of hatred designated by the concept of malicious intent. The support for such ideologies, which satisfy the material elements of section 260, was declared to be both impermissible and criminal, while all other ideologies were allowed unrestricted dissemination.

Within a few years after the dissolution of Czechoslovakia, the Czech Constitutional Court was snowed under with the review of substantially similar hate speech cases.[38] These numerous judgments from the 1990s concerned local authority ordinances from various cities and small towns (Ústí nad Labem, Brno, Jičín, Hořice v Podkrkonoší, Nová Paka, Pardubice, Vysoké nad Jizerou, Náchod, Červený Kostelec). The ordinances outlawed the promotion of movements that spread national, racial, religious or class hatred. In all of these judgments, the Court pointed out the incompatibility of the local specification of the hate speech provisions stemming from the Criminal Code (sections 260 and 261) with Article 39 of the Charter of Fundamental Rights and Freedoms,[39] and annulled the ordinances. The local instruments were struck down because they could not define the substance of the crime, even though they were simply paraphrasing the provisions of the Criminal Code. According to the Court, it is only the law (*jen zákon*) and not local ordinances that may determine which acts constitute a crime and the penalties or other detriments to rights or property that may be imposed (*nullum crimen, nulla poena sine lege*).

Finally, the most recent hate speech judgment of the Constitutional Court (in 2009) dealt with anti-Romani expression.[40] In 2001, the applicant, František Kroščen, brought a claim before an ordinary court against a restaurant owner. For some time, the restaurant premises had displayed a statue of a Greek goddess of antiquity holding a baseball bat in her hand with a visible inscription '*Na cikány*' (a rough translation being 'Get the gypsies!'). During the 1990s, members of the skinhead subculture often used baseball bats as a symbol to represent the intimidation of Romani communities. Both a regional and the High (*vrchní*) Court rejected this claim. Despite the fact that both found the defendant's action to be 'inappropriate', they refused to hold the defendant liable for infringement of personality protection rights. According to established case law, the scope of the provision on personality protection did not cover harassment. The claimant appealed repeatedly against the decisions of the lower courts until he reached the

[38] CC 29/95, 19 December 1995; CC 41/95, 24 April 1996; CC 42/95, 12 June 1996; CC 43/95, 3 July 1996; CC 44/95, 26 March 1996; CC 45/95, 11 June 1996; CC 1/96, 19 November 1996; CC 4/96, 10 June 1996; CC 38/03, 13 January 2004; CC 68/04, 6 June 2006.

[39] European Union, *Charter of Fundamental Rights of the European Union*, 7 December 2000, [2000] OJ C 364/01.

[40] CC 1174/04, 27 January 2010.

Supreme Court.[41] The Court had to reverse the appeal judgments of the lower courts twice, ordering them to decide on the merits again. After the third unsuccessful appeal to the Supreme Court against the decision of the lower courts, the applicant submitted a complaint to the Constitutional Court. Of crucial significance in coming to its decision was that the Constitutional Court referred to the EU Race Directive,[42] thus adding the available framework of EU non-discrimination law to reinforce the militant judicial narrative beyond national law and the Council of Europe. Applying the Race Directive, the Court cancelled the judgment of the Supreme and High Courts and referred the case back to the High Court for a rehearing. In this respect, it is important to mention that in 2008 the Court of Justice of the European Union (CJEU) used the Race Directive to frame the militant vision of hate speech into EU non-discrimination law.[43]

2.4 The Supreme Court

One of the most important judgments on hate speech in the Czech Republic was given by the Supreme Court (*Nejvyšší soud*).[44] The Court considered the appeal of a publisher, Michal Zítko, who had been convicted of releasing a Czech translation of Adolf Hitler's *Mein Kampf*. The book combines elements of autobiography with an exposition of Hitler's political ideology, and remains banned in a number of European countries. The Czech translation (*Můj boj*) was released by the publishing house, Otakar, in March 2000 without any additional comments or annotation. It did, however, contain an explicit anti-racist disclaimer.

The Supreme Court annulled Zítko's conviction and returned the matter to the police for further investigation. The lower courts had viewed the distribution of the Czech version of the book under provisions that prohibited support for fascism or anti-Semitism. Zítko was originally given a three-year suspended prison sentence and fined CZK 2,000,000 (approximately €50,000). Failure to pay the fine would have resulted in a one-year prison term. The Supreme Court found this interpretation of section 260 of the Criminal Code to be overly broad, and held that it was necessary within the meaning of the crime to prove the promotion of an actual movement and an action at the time of the crime. This means that there should be a specific movement to some extent organised and structured (*organizovaná a strukturovaná skupina osob*), with an explicit common position and malicious purposes as listed in section 260. Anti-Semitism is not a movement but an ideology that promotes hatred of Jews, which can serve as an intellectual resource for various movements. Moreover, it was necessary, according to the Supreme Court, to demonstrate that the conduct of the accused (in this case, the release of *Mein Kampf*) was designed to encourage and promote this movement.

[41] The Supreme Court is the highest appeal court, except for administrative and constitutional cases, with jurisdiction over criminal and civil cases.
[42] Council Directive 2000/43/EC (n 30).
[43] See Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestnijding v Firma Feryn NV* [2008] ECR I-5187. For a detailed examination of the judgment and developments on hate speech in EU law see Belavusau (n 17).
[44] Supreme Court (SC) 5 *Tdo* 337/2002, 24 July 2002.

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2.5 AN OVERVIEW OF THE CURRENT HATE SPEECH ISSUES

This reconstruction of the *Mein Kampf* case before the Supreme Court is incomplete without insight into some sensitive aspects of the neo-Nazi movement in the Czech Republic. The latest ECRI Report on the Czech Republic, from 2009, focuses particular attention on the disturbing evidence of intensification of the activities of extreme right wing groups, whose repeated demonstrations have led to escalating tensions and at times violent acts, especially towards the Roma community.[45] In 2008, the *Národní strana* (National Party, in existence since 2002) published sweeping attacks on Muslims on its website, following the death of the Czech ambassador to Pakistan in a terrorist bombing. However, the legal proceedings against the party were dismissed by the relevant court, which did not find that any law had been violated. With similarities to the analogous Polish and Hungarian organisations, the National Party strongly opposes Czech membership of the EU. In 2007 the party established a paramilitary group, *Národní garda* (National Guard). Racism and homophobia have been central to the populism advanced by the organisation. The ECRI noted, among other issues, that the group attracted attention by organising patrols outside a school in mid-2008, ostensibly to protect local schoolchildren from assaults by Roma children, as well as attacking the participants of Gay Pride in Brno in June 2008.[46] Marches with hate speech slogans have been organised with increasing frequency and publicity by the Workers' Party[47] and well-known neo-Nazi groups such as the National Resistance and the Autonomous Nationalists. Nazi groups have tried to organise patrol groups to 'monitor' the situation between the majority and the so-called 'inadaptable' (*nepřizpůsobivý*) minority (a derogatory term referring to the Roma).

Another judgment from a lower local court illustrates the application of the hate speech provisions in the Criminal Code. In July 2009, a Czech singer, Michal Moravec from the neo-Nazi band Imperium, was sentenced by a court in the southern city of České Budějovice to a three-year prison term for the promotion of fascism in his song lyrics. An appeal court upheld the conviction. The subject of the case was Imperium's album *Triumf vůle* (*Triumph of the Will*), the title of which echoed the Nazi propaganda film, *Triumph des Willens*, shot in the 1930s by Leni Riefestahl. The infamous film chronicled the 1934 Nazi Party Congress in Nuremberg. The Court found evidence of hateful propaganda in the lyrics of this album. One of the songs, for example, contained the phrase '*chceš odplatu, chceš řešení, chceš bílou revoluci*' ('you want revenge, want a solution, you want a white revolution'). The defence argued that, taken abstractly, such wording does not contain any explicit promotion of hatred. Following the American test of content-based restriction with no clear present danger or hate crime[48] the

[45] ECRI Report on the Czech Republic (n 27) 20.
[46] ibid.
[47] On the dissolution of the populist Workers' Party in the context of militant democracy, see Miroslav Mareš, 'Czech Militant Democracy in Action: Dissolution of the Workers' Party and the Wider Context of this Act' (2012) 26 *East European Politics and Societies* 33.
[48] The First Amendment jurisprudence of the US Supreme Court relies on the presumption of the inadmissibility of 'content-based restrictions', ie a restriction on the exercise of free speech based on subject matter or type of speech.

case would have failed. However, the Czech court followed the Strasbourg model of contextualised reading, under which a speech act is not complete without a contextual affirmation (such as historical references, evidence of group persecution or racial tensions, presence of a disclaimer or lack thereof, the audience and the nature of the source of expression, visual background). Michal Moravec was a member of the militant neo-Nazi movement *Národní odpor* (National Resistance), and was invited to perform his songs during its meetings. In addition, Ivo Svoboda, a court expert on extremism from a public university (*Univerzita obrany*, the University of Defence), confirmed that the cover design of the album contained the traditional symbolic elements of racist propaganda; this led to the criminal conviction of Moravec.[49]

Under the Broadcasting Act and the Czech Television Act, the broadcast media are subject to a duty to strike the right balance and, in particular, not to promote intolerance. However, civil society actors report that, while some journalists are sympathetic to minority issues and are willing to cover positive stories, feedback on such stories is generally negative. The tabloid press frequently typecasts members of the Romani community by definition as people who steal, who fail to pay their rent, who are violent and who refuse to work.[50]

Under this atmosphere of constant ostracism and theatrical demonisation, many Czech Roma prefer to hide their identity. In the 2001 census, for example, only 11,716 people identified themselves as Roma, while informal estimates suggest that the actual number is between 15 to 30 times higher. In the course of the 'Velvet divorce' from Slovakia, a new law on citizenship was enacted, which arguably was designed to prevent Roma from obtaining the new Czech citizenship. This law was eventually amended in 1999.[51] The historic prejudices, the caricaturing of the Roma minority in the media and the climate of radical racist slurs create an atmosphere of constant intimidation for Czech Romani communities. An exemplary episode of this hateful climate is the decision by the local authority of Ústí nad Labem to construct a wall dividing houses inhabited by Roma from the rest of the settlement.[52] The decision was ruled as unlawful under anti-racist provisions before the regional and higher courts.

In another case, the Supreme Court was asked to award compensation to Romani individuals for refusal of service in a restaurant.[53] In a similar case from 2005 the regional court in Ostrava decided in favour of Romani plaintiffs who had been refused service in a restaurant. The plaintiffs conducted an experiment on the restaurant premises. While the ethnic Czech customers were

Such restraint is permissible only if it is based on a compelling state interest and is so narrowly worded that it achieves only that purpose.

[49] See Miroslava Nezvalová, 'Zpívání o "bílé revoluci" vyneslo hudebníkovi tři roky vězení', *iDNES.cz*, 29 July 2009, http://zpravy.idnes.cz/zpivani-o-bile-revoluci-vyneslo-hudebnikovi-tri-roky-vezeni-pr9-/krimi.asp?c=A090729_145348_krimi_pei.

[50] ECRI Report on the Czech Republic (n 27) 21.

[51] Clemens Wiedermann, 'Czech Republic' in Gerda Falkner, Oliver Treib and Elisabeth Holzleithner (eds), *Compliance in the Enlarged European Union: Living Rights or Dead Letters?* (Ashgate 2008) 35.

[52] Somewhat symbolically, the first case on hate speech before the Czech Constitutional Court (in a series of similar cases, described earlier in the context of the Constitutional Court decisions) also originated from Ústí nad Labem. In the former case from the early 1990s, local authorities had been rather over-zealous in their willingness to translate the hate speech clause from the Criminal Code into a local act.

[53] Supreme Court (SC) 30 *Cdo* 4431/2007, 28 March 2007.

properly served, the Romani would-be customers were told that the restaurant was a private club and therefore they could not have access to any of its services. The Ostrava regional court awarded compensation of CZK 50,000 (approximately €2,000) to each of the plaintiffs. However, the High Court in Olomouc reduced the amount of compensation, following which the plaintiffs appealed to the Supreme Court. The Supreme Court annulled the decision of the High Court in Olomouc, holding that it was irrelevant that the plaintiffs were conducting situation testing when experiencing discriminatory treatment.[54] The reluctance of the lower courts to frame anti-Roma utterances into the criminal construction of hate speech is further illustrated vividly by the case before the Constitutional Court involving the restaurant statue with the baseball bat, discussed above.[55] Neither the regional nor the higher courts considered the inscription 'Get the gypsies' to be an incitement to hatred or aggression.

The ECRI report highlights another case, brought under the hate speech provisions by the deputy chair of the Government Council for Roma Community Affairs against an extreme right-wing party, followed by two judicial decisions of the lower courts in 2008 concerning neo-Nazi websites. The first decision upheld a three-year suspended sentence 'for a supporter of a skinhead convicted of launching and running neo-Nazi web pages'. In the second decision, two men were sentenced to prison for two and three years respectively for running a neo-Nazi website that supported and promoted hateful movements.[56]

In synthesis, the Czech legislative and judicial approaches to hate speech illustrate the mainstreaming of constitutionalism based on the presumptions of *militant democracy* – the idea that certain freedoms (first of all, freedom of expression and freedom of association) should be limited to prevent the growth of authoritarianism through the unrestricted exercise of civil liberties. However, the case of anti-Roma hate speech reveals the unwillingness of the lower courts to frame anti-Romanyism into the core of the protective mechanism. The slow changes in the dominant policies are heavily influenced by the incentives from Strasbourg and Brussels. The hate speech sagas demonstrate that the outcome often depends on the persistence of social movements to proceed with a case up to the Supreme and Constitutional Courts.

3. HUNGARY

3.1 THE SOCIAL AND HISTORICAL BACKGROUND

Like the Czech Republic, Hungary descends from the Austro-Hungarian dual monarchy. Unlike Poland and the Czech Republic, it underwent Ottoman occupation in the sixteenth and seventeenth centuries. Until 1918, Hungary remained under Austrian Habsburg rule, experiencing

[54] See the case note by Pavla Boučková, 'Supreme Court Decides on Amounts of Compensation Awarded in Racial Discrimination Cases', *European Network of Legal Experts in the Non-Discrimination Field,* 4 January 2010.
[55] CC 1174/04, 27 January 2010 (n 40) and accompanying text.
[56] ECRI Report on the Czech Republic (n 27) 21–22.

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only a relatively short period of independence before the installation of the communist regime in 1948.

The historical context explains the predispositions of contemporary nationalism in Hungary, as well as its ethnic composition. Towards the end of the nineteenth century, non-Hungarian nationalities living within the borders of the country constituted more than half of the population. Following the revision of the borders after the First World War, this proportion changed significantly. Some 33 per cent of Hungarians populating the Carpathian Basin (around 3 million people) found themselves outside the borders of the new country, while the number of minorities living within the borders of Hungary declined. As in the case of the Czech Republic and Poland, a very significant part of the Jewish (who often comprised half of an urban population) and Romani populations were tragically reduced during the Second World War. Under the post-war arrangements in CEE, Hungary was accused of acting as a Nazi satellite and lost a large part of its territory. Those arrangements provoked an enormous sense of nationalist victimhood among Hungarians, partly as a result of the large portions of the Magyar population left outside the country's borders, especially in Romanian Transylvania and the Slovak Republic. This peculiar victimhood has become a strong element of the Hungarian nationalist ethos, with explicit implications for the problems of hate speech and historical revisionism.[57]

Act LXXVII of 1993 on the Rights of National and Ethnic Minorities recognises 13 national minorities or ethnic groups. It proclaims the protection of their educational and linguistic rights and safeguards a system of local self-government. Among the ten million population of Hungary, Roma constitute the largest minority (around 400,000 to 600,000). Other recognised minority groups include Armenians, Bulgarians, Croats (around 90,000 to 100,000), Germans (around 200,000), Greeks, Poles, Romanians, Ruthenians (Rusyns), Serbians, Slovaks (around 100,000), Slovenians and Ukrainians.[58] Unlike Poland, predominantly Catholic Hungary is a significantly less religious country, with a long tradition of religious tolerance and strong secularisation left over from the communist period.[59]

3.2 The Legislative Framework

The Hungarian Constitution grants protection to national and ethnic minorities: it ensures opportunities for their collective participation in public life, and enables such groups to foster their own culture and to use and receive school instruction in their mother tongue. Moreover, it protects their freedom to use their names as spelled and pronounced in their own language. The Constitution and Act LIX of 1993 on the Parliamentary Commissioner for Civil Rights

[57] For an appraisal of the Hungarian national tradition in legal settings, see Zoltán Péteri, 'National Tradition and Outside Influence in the History of Human Rights in Hungary' (1996) 3 *Journal of Constitutional Law in Eastern and Central Europe* 145.

[58] For a more detailed account of the Hungarian minorities in the context of human rights protection, see Péter Paczolay, 'Human Rights and Minorities in Hungary' (1996) 3 *Journal of Constitutional Law in Eastern and Central Europe* 111.

[59] Emmanuelle Causse, 'Hungary' in Falkner, Treib and Holzleithner (n 51) 61.

(Ombudsman) provide for the institution of a Parliamentary Commissioner to protect the rights of national and ethnic minorities. The Office for National and Ethnic Minorities, established in 1990, is responsible for coordinating the implementation of the government's objectives. Furthermore, the Minorities Ombudsman is responsible for investigating any abuse of rights coming to her attention and for initiating general and individual measures to remedy such abuse. According to Hungarian constitutional scholar, Renáta Uitz, the Minorities Ombudsman was successful in prompting the Constitutional Court to remind Parliament about missing guarantees (or rules) for the adequate political representation of ethnic and national minorities at both the national governmental and local levels.[60]

Overall, the institutional structure of minority protection in Hungary appears to be more developed than it is in Poland and the Czech Republic, especially with regard to the current transposition of the EU equal treatment provisions. The enactment of Act CXXV on Equal Treatment and Promotion of Equal Opportunities in December 2003 introduced into Hungarian law a prohibition on discrimination in a variety of public and private law relationships, including racial origin, nationality or ethnicity, mother tongue and religious convictions, and the subsequent establishment of the Equal Treatment Authority in 2005. It provided individuals with a direct avenue of redress for violations of non-discrimination norms and generated considerable interest in Hungarian society, with nearly 500 complaints being lodged in the first year alone – a number that has risen steadily ever since.[61] In this respect, Hungary has been several steps ahead of the Czech Republic and Poland. In order to improve accessibility for individuals and NGOs outside Budapest, the Equal Treatment Authority signed a formal cooperation agreement with the Houses of Equal Opportunities that now operate in each of Hungary's 19 counties.

Most importantly, the Act also enables NGOs to act as plaintiffs (*actio popularis*) in cases where they consider a provision to be discriminatory, even though no individual has yet suffered any harm. The option of turning to the Equal Treatment Authority has empowered plaintiffs to request the fining of offending parties and to publish the names of bodies that have breached the requirement of equal treatment. Like the Czech Republic and Poland, at the time of writing Hungary has not yet ratified Protocol 12 to the European Convention on Human Rights,[62] nor the Additional Protocol to the Convention on Cybercrime concerning the criminalisation of acts of a racist or xenophobic nature committed through computer systems.[63] Both of these instruments are highly relevant to hate speech within the Council of Europe. The 2009 ECRI report on Hungary notes that the Hungarian authorities envisaged serious incompatibilities for the Protocol with the Hungarian vision of freedom of speech:[64]

[60] Renáta Uitz, 'Hungary – High Hopes Revisited' in Leonardo Morlino and Wojciech Sadurski (eds), *Democratization and the European Union: Comparing Central and Eastern Post-Communist Countries* (Routledge 2010) 45.
[61] ECRI, 'ECRI Report on Hungary (Fourth Monitoring Cycle)' 24 February 2009, 7.
[62] n 32.
[63] n 33.
[64] ECRI Report on Hungary (n 61) 12.

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> Despite their legislative efforts in this direction, the present constitutional position with respect to the balance to be found between freedom of expression and the prohibition of hate speech make it impossible to predict when the Protocol may be ratified.

Like the analogous provisions in the Czech Code, Article 174B of the Hungarian Criminal Code defines specific offences as hate crimes on the grounds of national, ethnic, racial or religious affiliation. These offences are subject to more severe penalties than analogous offences (acts of violence, cruelty or coercion by threats) committed against persons not belonging to such groups. Article 269 of the Criminal Code contains a hate speech provision, several formulations of which have been consistently challenged before the Constitutional Court. Its current version prohibits incitement against a community (Article 269/B). In addition, several other provisions (on defamation, libel and desecration) provide certain scope for accusations of a hate speech nature before the courts.

In concluding this account of the socio-legal context of free speech legislation in Hungary, a recent symptomatic shift towards censorship should be mentioned. Following the victory of the conservative right under the leadership of the current Prime Minister, Viktor Orbán, in April 2010, the Hungarian Parliament passed a new media law in the autumn of 2010.[65] The law establishes a government-controlled media council with the authority to supervise independent media, and issue decrees and fines. This law has attracted serious criticism from various organisations and constitutional scholars as threatening the democratic gains of the last 20 years.[66]

3.3 The Hate Speech Saga before the Constitutional Court

When describing the post-communist reform of Hungarian criminal law, Gábor Halmai noted that in 1989, in parallel with the comprehensive amendment of the Constitution, a modification of the 1978 Criminal Code lifted incitement to hatred from the category of *crimes against the State* and, with its criminal liability greatly reduced, placed it among the *offences against public peace*.[67] The new clause was attributed to the taxonomy of *incitement against the community*. The Code detailed two crimes, initially under this title (Article 269): (1) incitement to hatred,

[65] Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules on Media Content.

[66] The law has been widely criticised by the Hungarian and European press. Moreover, the text of the new Hungarian Constitution developed by the Fidesz (Hungarian Civic Union) government has been condemned as authoritarian. See, inter alia, Ian Traynor, 'Hungary Begins First EU Presidency with Warnings over Press Freedom', *The Guardian*, 3 January 2011, http://www.guardian.co.uk/world/2011/jan/03/hungary-press-crackdown-eu-presidency.

[67] Gábor Halmai, 'Criminal Law as Means against Racist Speech? The Hungarian Legal Approach' (1997) 4 *Journal of Constitutional Law in Eastern and Central Europe* 41, 42. Similarly, Petér Molnár makes an important observation that during the communist years 'the primary use of the incitement provision was to protect the ruling totalitarian ideology from dissent. The ideological character of the Criminal Code is effectively captured in the provision "insult against a community", which included "socialist conviction" among the listed targets, instead of including political conviction in general': see Petér Molnár, 'Towards Improved Law and Policy on "Hate Speech" – The "Clear and Present Danger" Test in Hungary' in Ivan Hare and James Weinstein (eds), *Extreme Speech and Democracy* (Oxford University Press 2009) 237, 243.

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and (2) an offence against a community in public or in the media. This two-fold construction by the Hungarian legislators has given rise to a lengthy judicial saga, in several parts, before the Constitutional Court.

Wojciech Sadurski quotes the words of Chief Justice László Sólyom (who later became President of Hungary from 2005 to 2010) who declared that the first decision on hate speech in 1992[68] 'opened the "Hungarian First Amendment" [sic] of the Constitutional Court, laying down at the start a liberal, extensive interpretation of the right to the freedom of expression'.[69] The parallels with First Amendment adjudication do not end with this quote. Similarly, Hungarian scholar, Petér Molnár, has suggested that the prevailing argument behind the hate speech decisions of the Constitutional Court was the adoption of the American approach, which he characterises as 'risky, but still the most prudent'.[70] In Decision 30 of 1992, the Constitutional Court rejected a petition that sought a determination of unconstitutionality for the first part of Article 269 (incitement to hatred). Instead, it took a substantially different position with regard to the second part (offence against the community), essentially echoing the wording of American judicial practice.[71]

The case was referred to the Constitutional Court by a judge of a lower court sitting in a hate speech case against a right-wing newspaper which had published statements denigrating a nationality. The petitioners sought an *ex post facto* review of the constitutionality of Article 269 of the Criminal Code. The first part of the article provided: 'Anyone who, before a large public audience, incited hatred against the Hungarian nation, any other nationality, people, religion or race, or certain groups among the population commits an offence punishable by up to three years' imprisonment'.

The second part of Article 269 stated as follows: 'Anyone in the same circumstances who uses an offensive or denigrating expression or commits similar acts against the groups above, commits an offence punishable by up to one year's imprisonment, corrective training or a fine'.

The difference between the two parts of the article thus essentially turned on the 'incitement of hatred' (arguably conceived in a mode similar to the *clear and present danger* test) on the one hand, and pure offensive and denigrating expression on the other. Theoretically, both constructions cover the domain of hate speech. When describing the background to the case, András Sajó noted that during the hearings 'both the attorney general and the president of the Supreme Court argued that the "offensive speech" provision was constitutional, since it was regarded as a necessary means for protecting minorities and pubic order'. They suggested that democracy is not sufficiently stable and that extremist speech could therefore negatively affect the democratic order.[72]

The restriction of freedom of expression under Article 269(1) was justified by the historically proven harmful effects of incitement to hatred on certain groups, the protection of fundamental

[68] Decision of the Constitutional Court, 30/1992.
[69] Wojciech Sadurski, *Rights before Courts: A Study of Constitutional Courts in Post-communist States of Central and Eastern Europe* (Springer 2005) 161.
[70] Molnár (n 67) 238.
[71] Here and further, Decision of the Constitutional Court 30/1992.
[72] András Sajó, 'Hate Speech for Hostile Hungarians' (1994) 3 *East European Constitutional Review* 82, 84.

constitutional values and Hungary's compliance with international law. The Constitutional Court found that the first part of Article 269 was sufficiently precise and did not define too broadly the scope of behaviour subject to criminal sanction. The criteria of specificity, clear definition and demarcation (and by their virtue, proportionality) were thus met.

However, the Court held that Article 269(2) was unconstitutional. In rhetorical terms, the judges constructed freedom of expression in that case through the metaphorical lens of the 'mother right to communication'.[73] The Constitution guaranteed free communication as a manifestation of individual behaviour and as a social process. At this point, the Hungarian Constitutional Court launched two traditions of free speech construction, marrying the American test of content neutrality with Strasbourg adherence to the ideals of *militant democracy*. Article 269(2) merely tackled opinion on the basis of content. The message conveyed by certain utterances was so clearly linked to a given situation and cultural context (which was subject to change) that the abstract, hypothetical definition of an offensive or denigrating expression (in the absence of an actual breach of the peace) was just an assumption that did not sufficiently justify the restriction of the external boundary (the violation of another right), which itself was uncertain. Criminal sanctions could be applied for the defence of other rights and only when unavoidably necessary. They were not to be used as a means by which to shape public opinion or the matter of political debate. Consequently, although upholding the first part of Article 262(1), the second part of Article 262(2) was declared null and void.

In explaining the difference, András Sajó draws parallels between the Hungarian doctrine of 'inciting words' and the American 'fighting words' (as in cases such as *Chaplinsky*[74] and *Beauharnais*[75]).[76] However, Hungarian balancing is far from the American approach in *Skokie*[77] and *R A V*,[78] and even further from the case law concerning totalitarian insignia, described below.

According to Chief Justice László Sólyom, in its 1992 hate speech decision the Constitutional Court 'has established a hierarchy of basic rights in which the freedom of expression ranks second to the right to life and human dignity'.[79] Despite the implicit quotation of the 'clear and present danger test' in the Hungarian text in English (when reversing the crime of 'offending

[73] Gábor Halmai deduces an original vision of the Hungarian Court stemming from the metaphor of 'mother right of communicative rights' that the Court uses for freedom of expression. Following Jürgen Habermas, he describes communicative rights as those that enable the citizen to form and express opinions or voluntarily refrain from communicating. In more usual parlance these are the rights to free speech, freedom of information, freedom of the press, freedom of association and privacy: see Gábor Halmai, '"Communicative Rights" in the Hungarian Constitutional Practice' (1996) 3 *Journal of Constitutional Law in Eastern and Central Europe* 181.
[74] *Chaplinsky v New Hampshire*, 315 US 568, 572 (1942).
[75] *Beauharnais v Illinois*, 343 US 250 (1952) 272–73.
[76] Sajó (n 72) 86. See also Kim Lane Scheppele, 'Limitations on Fundamental Rights: Comparing Hungarian and American Constitutional Jurisprudence' (2001) 8 *Journal of Constitutional Law in Eastern and Central Europe* 53.
[77] *Collin v Smith*, 439 US 916 (1978). In the literature, the case is often referred to as *Skokie* (a Chicago suburb with a predominantly Jewish population).
[78] *R A V v City St. Paul*, 505 US 377 (1992).
[79] László Sólyom, 'The Interaction between the Case Law of the ECHR and the Protection of Freedom of Speech in Hungary' in (2000) *Protection des droits de l'homme: la perspective européene. Mélanges à la mémoire de Rolv Ryssdal* 1317, 1320.

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a community'), Wojciech Sadurski described the case as more libertarian in its rhetoric than in its actual argument.[80] On the one hand, Sadurski views the decision as 'an impressive array of constructions supporting a very robust conception of freedom of expression' and promoting an 'expansive strongly libertarian theoretical construction'.[81] However, as far as the first and most important part of the judgment (assessing the crime of incitement to hatred) is concerned, Sadurski is not that optimistic about the libertarian potential of the Hungarian Constitutional Court:[82]

> One is struck by how one-sided, pro-restriction the argument is. Obviously, the incitement to hatred is an extremely controversial matter, which generates a strong clash of values … While the opinion expressly cites the 'clear and present danger' test for such legitimately restricted incitement, the test merely plays an ornamental role, because there is no hint that the prohibition in Art. 269 (1) is activated only when the incitement to hatred is likely to lead to violence or discrimination. Rather, the very fact of such incitement is seen as violating the rights of the victims of such speech, whether actual consequences in the form of violence or discrimination are likely to follow or not.

Consequently, Sadurski differentiates between incitement to hatred and incitement to violence. He maintains that the distinction is not evident in the judgment because incitement to hatred is characterised as 'the emotional preparation for the use of violence' and, as such, 'an abuse of the freedom of expression'. Kim Scheppele draws attention to the Hungarian construction of dignity juxtaposed as a higher value to freedom of speech:[83]

> The right to human dignity means that the individual possesses an inviolable core of autonomy and self-determination beyond the reach of all others, whereby – according to the classical formulation – the human being remains a subject, not amenable to transformation into an instrument or object. … This formulation can be seen as a rejection of the former regime of using individual citizens for its own objectives.

The battle over Article 262 of the Criminal Code has continued since this case both in Parliament and within the government. Attempts to rebut the approach of the Hungarian Court have been impressively numerous. The rather neutral formulation of Article 262(1) permitted by the Court was criticised as being toothless in terms of providing an actual criminal basis for prosecution. Several redefinitions of Article 262, widening the scope of penalised hate speech beyond a *clear and present danger* test, have been suggested. However, in a subsequent series of judgments, the Constitutional Court of Hungary has declined the opportunity to broaden the scope of the prohibited 'incitement' to: 'arousal of hatred';[84] 'inflaming hatred';[85] 'gestures reminiscent

[80] Sadurski (n 69) 161–62.
[81] ibid 161–62.
[82] ibid 162.
[83] Scheppele (n 76) 59 (substantially echoing the wording of Sólyom from Decision of the Constitutional Court 64/1992, (XII 21) AB).
[84] Decision of the Constitutional Court 12/1999, (V 21) AB.
[85] Decision of the Constitutional Court 18/2004, (V 25) AB.

of a totalitarian regime and denigrating a member of a given group';[86] as well as an attempt to prescribe hate speech prohibition in the Civil Code.[87]

Somewhat symbolically, the figure of László Sólyom – at that time President of Hungary (2005–10) and formerly President of the extremely activist Constitutional Court (1990–98), and famous for his appraisal of the earlier constitutional decisions as the 'Hungarian First Amendment' – became prominent in the context of free speech adjudication. Before signing the bills proposed by Parliament, he initiated at least two cases before the Constitutional Court (Decisions 95/2008 and 96/2008). In his petitions, the President expressed concern that the amendments to the criminal and civil codes restricted the fundamental right of freedom of expression. In this rich jurisprudence of the Hungarian Constitutional Court one can deduce a very strong emphasis on the requirement for legal certainty (comparable to *Normenklarheit* in the practice of *Bundesverfassungsgericht*) as the most serious threshold in the assessment of the proportionality of free speech restrictions.

There is an intriguing legal story from the Hungarian judicial saga on the prohibition of totalitarian (and, in particular, communist) symbols. One might compare it with the most famous of Hungarian dances, the *czardas*, which starts slowly but ends with a very fast tempo. The story of the criminalisation of totalitarian symbols in Hungary mimics this pattern. It started as long and fairly complicated legal proceedings before the Constitutional Court,[88] developed into a case before national courts, at some point reached the Court of Justice of the European Union (CJEU) in Luxembourg (in its preliminary ruling, the Court rejected the case as falling outside *ratione materiae*)[89] and ended up in Strasbourg, where the European Court of Human Rights produced a rather fast and disputable judgment, overturning the national constitutional perspective on the issue. Hungary took by far the most legally explicit position among the CEE countries on the issue, penalising the use of communist and Nazi symbols.[90] In the case under consideration,

[86] Decision of the Constitutional Court 95/2008, (VII 3) AB.
[87] Decision of the Constitutional Court 96/2008, (VII 3) AB.
[88] Decision of the Constitutional Court 14/2000, (V 12) AB. The pending of the case before the Constitutional Court is characterised by the considerable slow-down in the renowned activism of the Hungarian court. Although the petition was submitted long before, the judgment of the Constitutional Court appeared only in 2000. Gábor Halmai explains this longer 'lead time' by the fact that in previous years the majority of the activist Sólyom Court began to hesitate over the nature of the right of freedom of expression as a 'mother right', especially in such cases as the constitutionality of the provision criminalising the defamation of national symbols or the use of totalitarian symbols: see Gábor Halmai, 'The Transformation of Hungarian Constitutional Law from 1985 to 2005' in András Jakab, Péter Takács and Allan F Tatham (eds), *The Transformation of Hungarian Legal Order 1985–2005* (Kluwer 2007) 1, 9–10.
[89] Interestingly, the national court linked the question with the fundamental principle of non-discrimination and equal treatment in EU law, in particular stemming from art 6 of the Treaty on the European Union (TEU) [2008] OJ C115/13 and Directive 2000/43/EC (n 30). In October 2005, the CJEU declared that it had no jurisdiction to answer the question referred by the national court. The Budapest regional court had to uphold the applicant's conviction. The case is a brilliant illustration of the raising of forum shopping between Strasbourg and Luxembourg in the 'European' adjudication of non-discrimination cases.
[90] The discussion of the use of 'fascist symbols' usually relates to the public manifestation of the so-called Árpád flag of the Arrow Cross, Hungary's extreme National Socialist party. The Arrow Cross was adopted as a state symbol for a few months in 1944, during which thousands of Roma and Jews were murdered. Several radical right organisations use the symbol during their assemblies.

the criminal proceedings were brought against Mr Attila Vajnai, Vice-President of the Hungarian Worker's Party, for displaying a five-point red star on his jacket during a demonstration held in Budapest on 21 February 2003. A police officer on duty requested that he remove the symbol, which he agreed to do. In its judgment of 11 March 2004, the Central District Court in Pest found Mr Vajnai guilty of having used a 'totalitarian symbol' in violation of Article 269/B(1)(b) of the Criminal Code. Unexpectedly for many, the Strasbourg Court in *Vajnai v Hungary* not only refused to reject the case instantly for incompatibility with Article 17 ECHR, but went as far as to find a violation of Article 10 ECHR (freedom of expression). The Court therefore held that the ban was overly broad in view of the multiple meanings of the symbol.[91] In 2013, the newly formed Constitutional Court of Hungary had no other choice but to 'revise' the provision on totalitarian symbols as unconstitutional.[92]

3.4 AN OVERVIEW OF THE CURRENT HATE SPEECH ISSUES

The 2009 monitoring report on Hungary by the European Commission against Racism and Intolerance maintains that the very high level of constitutional protection afforded to freedom of expression has made it impossible for the authorities to legislate effectively against racist expression:[93]

> [U]nder Hungarian law, only the most extreme forms of racist expression, i.e. incitement liable to provoke immediate violent acts, appear to be prohibited, a standard so high that it is almost never invoked in the first place. While it is true that legislation alone cannot turn racist attitudes around, the almost total absence of limits on free speech in Hungary complicates the task of promoting a society that is more open and tolerant towards its own members.

This observation appears to be somewhat simplistic, in particular for explaining the available avenues of legal mobilisation for social movements. As has been previously demonstrated, the approach of the Hungarian Constitutional Court has actually been far more sophisticated and the general non-acceptance of the incitement to hatred remains in line with dominant 'Strasbourg' visions of militant democracy: the prohibition of incitement to hatred of certain groups is still prescribed by statute, in the Criminal Code. That 'incitement' clause has been occasionally invoked in criminal proceedings by national courts. Nonetheless, there is some substance to ECRI's 'invisible'

[91] *Vajnai v Hungary* App No 33629/06 (ECtHR, 8 July 2008). Two factors were taken into account. Mr Vajnai was a politician not participating in the exercise of powers conferred by public law. Secondly, almost two decades had elapsed since Hungary's transition to pluralism. The Court found that the star also symbolises the international workers' movement, struggling for a fairer society, and certain lawful political parties active in different High Contracting Parties of the Council of Europe. The government, according to the Court, failed to show that wearing a red star exclusively means identification with totalitarian ideas, especially when viewed in the light of the fact that the applicant did so at a lawfully organised, peaceful demonstration.

[92] Decision of the Constitutional Court 4/2013, (II 21) AB.

[93] ECRI Report on Hungary (n 61) 8.

argument. The hate speech decisions of the Hungarian Constitutional Court have made ordinary courts extremely reluctant to apply Article 269 of the Criminal Code.

Three categories of hate speech are particularly pertinent in the Hungarian context: anti-Semitic, anti-Roma and homophobic utterances. Once an important hub for Central European Jews, Budapest remains a significant cultural centre for Hungarian Jews, living both in the country and in diaspora abroad. The Nazi invasion of Hungary in 1944 led to the murder of approximately 600,000 Hungarian Jews, with considerable collaboration by the Hungarian authorities.[94] In 1994, the fiftieth anniversary of the Holocaust in Hungary, the government officially apologised for Hungarian complicity in the *Shoah*.

After a rally by several hundred skinheads in Budapest in 1996, the police questioned a neo-Nazi leader, Albert Szabó, about an anti-Semitic speech he gave as an alleged incitement against a community. A year earlier, the Attorney General had initiated a lawsuit against Szabó and charged him with racial incitement against Roma and Jews. At his trial in March 1996, despite general public expectations and to the consternation of many, Szabó was acquitted. The court concluded that there had been no incitement to racial hatred and that the defendant had merely availed himself of the right of freedom of speech.

A story similar to the Czech legal controversy surrounding the publication of *Mein Kampf* arose also in Hungary when, in the 1990s, the book was published in a Hungarian translation. Unlike the Czech (*Michal Zítko*) case – in which the publisher provided a genuine disclaimer in the book denying any allegations of hate speech *ab initio* – the Hungarian publisher, Áron Monús, was openly anti-Semitic and even had a previous conviction for his book *Conspiracy: the Nietzschean Empire*. The latter publication (which echoes the sentiments expressed in *The Protocols of the Elders of Zion* and *Mein Kampf*) was confiscated by the authorities. A Hungarian émigré, Monús claimed that *Mein Kampf* belonged to universal cultural heritage and should be made available in Hungarian 'to set things straight'. A court overturned the ban after Monús appealed on the basis of freedom of speech.[95]

The intensification of anti-Roma hate speech is another troublesome phenomenon in the Hungarian public discourse. As in the case of the similarly titled Czech organisation (*Národní garda*), this trend can be illustrated with the rise of the radical right-wing Hungarian Guard (*Magyar Gárda*). Since its creation in 2007, the Guard has organised numerous public rallies throughout the country, including in villages with large Roma populations. Despite apparently innocuous articles of association, amongst the group's chief messages is the defence of ethnic Hungarians against so-called *cigánybűnözés* (Gypsy crime). Members of the Hungarian Guard parade in matching, paramilitary-style black boots and uniforms, with Nazi insignia and flags.[96] Furthermore, the recent anti-Roma violence of 2012 and the recurrent anti-Semitism

[94] For an account of the history of Hungarian Jewry, see George Konrád, *The Invisible Voice: Mediations on Jewish Themes* (Peter Reich (tr), Harcourt 2000).
[95] Ruth Ellen Gruber, 'East-Central Europe', in David Singer (ed), *American Jewish Year Book* (American Jewish Committee 1998) 342, 348.
[96] ECRI Report on Hungary (n 61) 24. In January 2008, the Prosecutor General initiated court proceedings to ban the Hungarian Guard.

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following the rise of right-wing parties in Hungary are alarming facts.[97] In 2010, 17 per cent of the population voted for the explicitly anti-Semitic and anti-Romani *Jobbik* party.[98]

In 2008, the Prosecutor General initiated court proceedings to ban the *Gárda*, alleging that its activities differ from its memorandum of association. The case was delayed several times. On the first day of litigation, members of the *Gárda* physically blocked journalists from entering the court, leading to a change in court rules and creating an atmosphere of terror. On 16 December 2008, the Metropolitan Court of Budapest (*Fővárosi Bíróság*), as the court of first instance, dissolved the organisation. It held that the activities of the organisation were discriminatory towards minorities. The *Gárda* appealed against the judgment, but on 2 July 2009 the Metropolitan Court of Appeal (*Fővárosi Ítélőtábla*) upheld the judgment of the first instance court. Following the judgment, the Guard's representatives announced that they would apply for review by the Supreme Court and ultimately challenge the judgment before the European Court of Human Rights in Strasbourg.[99]

To sum up, Hungary is a perfect example of a transitional democracy importing free speech transplants from both Western Europe and the United States. The legislative framework in Hungary is certainly illustrative of the classical concerns of militant democracy. However, the Hungarian case demonstrates an unusual attempt to marry the continental *Volksverhetzung* (incitement to popular hatred, central to the constitutional ethos of militant democracy) and the American doctrines of content-neutrality, fighting words and the clear and present danger test. This contradiction has led to an exceptionally rich jurisprudence for the Constitutional Court, which in numerous judgments had to restrict Parliament's attempts to flesh out the core of the criminal provision. Against the backdrop of the provision's constant challenge in the Constitutional Court, the lower courts became unwilling to prosecute the virulent haters. However, there were quite a few examples in which the higher courts did side with the concerns of militant democracy (for example, in the *Vajnai* and *Gárda* cases). Anti-Semitic, anti-Roma and homophobic hate speech underline the rhetorical fallacies of the ever-strong radical right in the landscape of Hungarian politics, the media and social life.

4. POLAND

4.1 THE SOCIAL AND HISTORICAL BACKGROUND

Paradoxically for a country that itself remained a splinter of a multinational empire, Poland is often said not to shelter any significant national minority exceeding 0.5 per cent of the population. However, the characterisation of Poland as a mono-national state is simplistic. It is

[97] See Charles McPhedran, 'Official Terror for Hungary's Roma', *The Global Mail*, 7 February 2012, http://www.theglobalmail.org/feature/official-terror-for-hungarys-roma/35.

[98] The party is called *Jobbik Magyarországért Mozgalom,* which literally means 'The Movement for a Better Hungary': see Michael S Salberg, 'Anti-Semitism in Hungary', *The New York Times*, 25 April 2012.

[99] For a description of the intimidating obstruction of the court proceedings, see ECRI Report on Hungary (n 61) 24.

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impossible to adequately comprehend the hate speech issues in this country without a link with the historical specificities that sustain Polish political and religious populism.

Until the eighteenth century, Poland was a multinational commonwealth (the first *Rzeczpospolita*) in association with the Grand Duchy of Lithuania, comprising a grouping of pre-modern ethnicities for Poles, Lithuanians, Belarusians and Ukrainians (all of which developed their national states) on the one hand, and Jews, Roma, Tatars, etc., on the other.[100] After three partitions of the Commonwealth in the eighteenth century, the country ceased to exist for almost two centuries and found its lands divided between Austria, Prussia and Russia. The whole intellectual tradition of Poland is intimately connected with the memory of the deprivation and the regaining of national statehood.[101] In 1918, Poland restored its sovereignty as a multi-national state. The interwar period of Polish independence is celebrated in national history, with increasingly authoritarian state practices (including those affecting freedom of expression), especially with regard to national minorities, often neglected in populist discourses. The Second World War led to a further partition of Poland between Nazi Germany and Soviet Russia, as well as to a loss of approximately six million Polish citizens. Half of those who died were Jewish, whose population was almost exterminated from 3,000,000 pre-war to 300,000 at the war's end. A significant group of the Germans from Silesia were forced to leave the country after the post-war division of Europe. Furthermore, Poland had to exchange with the Soviet Union the population of the so-called *Kresy Wschodnie* (eastern part of the first *Rzeczpospolita*, comprising the then Soviet Republics of Belarus, Lithuania and Ukraine). Both of these factors, along with the annihilation of the Polish Jewry and Roma, led to the remarkable homogeneity in the ethnic composition of the country. According to the 2002 census, 96.74 per cent of the citizens consider themselves Poles. The largest minorities include Germans and Silesians, who live relatively compactly in the western parts,[102] and Belarusians who densely inhabit eastern Poland. Other minorities include the autochthonous Kashubians (in the north), Ukrainians, Lithuanians, Russians, Roma, Jews, Slovaks and Tatars. However, much larger Polish communities live in the neighbouring Belarus, Ukraine and Lithuania, where they constitute significant minority groups.[103]

This apparent ethnic homogeneity is, however, no barrier to xenophobic hate speech. The traditional nationalist populism in Poland has been nourished by a Catholic messianism, strong anti-Semitic rhetoric, anti-Roma ostracism, anti-Germanic narratives and victimhood of the lost *Kresy* (the eastern borderlands). As demonstrated in a remarkable sociological survey by

[100] For an English language account of the complicated Polish identity, embracing several pre-modern ethnicities, see Timothy Snyder, *The Reconstruction of Nations: Poland, Ukraine, Lithuania, Belarus, 1569–1999* (Yale University Press 2003).
[101] For an account of Polish history and the role of *zabory* (partitions), see Jerzy Zdrada, *Historia Polski 1795–1914* (PWN 2005).
[102] On the complicated national identity of 'Polish Germans', see James E Bjork, *Neither German Nor Pole: Catholicism and National Indifference in a Central European Borderland* (University of Michigan Press 2008).
[103] For a sociological account of Polish minorities, see Wanda Dressler (ed), *Le second printemps des nations: sur les ruines d'un Empire, questions nationales et minoritaires en Pologne (Haute Silésie, Biélorussie polonaise), Estonie, Moldavie, Kazakhstan* (Bruylant 1999).

Sergiusz Kowalski, the main addressees of hate speech in Polish media are Jews, Roma, socialists, the LGBT community, Germans and their eastern neighbours (foremost Russians and Ukrainians), as well as liberal politicians, feminists, atheists and advocates of European integration.[104] The Polish hate speech narratives have been fostered by peculiar rhetoric that alleges various collaborative practices between these groups. Representative in this regard is the alleged partnership of the so-called *Żydokomuna* (Judeo-communism), a pejorative anti-Semitic stereotype, which came into use between the two world wars, and which blamed Jews for the rise of communism in Poland.[105]

Olga Wysocka gives an interesting explanation of Polish political populism, sustained by xenophobic discourses. She links it to the nineteenth century Russian movement of '*narodnichestvo*' (*народничество*),[106] based on the strong binary opposition of the peasant people (a concept excluding Jews and Roma) vis-à-vis the nobility in the Russian empire. Similarly, the never fulfilled Polish lustration after the fall of communism (unlike in the Czech Republic) has been a powerful supporting factor for hateful discourses. Wysocka concludes that a specific element in Polish nationalist populism is the anti-establishment emphasis that derives from dissatisfaction with the settlement of accounts with communism. This dissatisfaction is rhetorically materialised in the concept of a 'network' that links post-communist bureaucrats and compromised opposition forces.[107] Adam Bodnar suggests that the return of right-wing politicians to government after EU accession (in the ultra-conservative government of Lech Kaczyński), coupled with a still vulnerable civil society and media, were particularly fruitful events for Polish hate speech. He concludes that, as a result of the crisis following the failure of the Constitutional Treaty, the EU failed to address the situation in Poland and showed 'a lack of capability in dealing with [the] "step-by-step" road towards liberal democracy in Poland'.[108]

4.2 THE LEGISLATIVE FRAMEWORK

After the fall of communism, Poland made considerable advances in safeguarding European standards of the right of freedom of speech and the liberal vision of media space. Public television and radio are regulated by a government agency, known as *Krajowa Rada Radiofonii i Telewizji* (the National Radio & TV Committee). A number of private and public television and radio channels, along with diverse publications and electronic sources in Poland, make it one of the most versatile media markets in the EU. Along with freedom of speech, the Polish Constitution guarantees non-discrimination, based on a very broad provision in Article 32:

[104] Sergiusz Kowalski and Magdalena Tulli, *Zamiast procesu. Raport o mowie nienawiści* (WAB 2003).
[105] See Jan T Gross, *Fear – Anti-Semitism in Poland after Auschwitz: An Essay in Historical Interpretation* (Random House 2006) 192–243; Marek Jan Chodakiewicz, *After the Holocaust. Polish-Jewish Conflict in the Wake of World II* (Columbia University Press 2003).
[106] Olga Wysocka, 'Populism: The Polish Case', PhD thesis, European University Institute, 2010, 10.
[107] ibid.
[108] Adam Bodnar, 'Poland: EU Driven Democracy?' in Morlino and Sadurski (n 60) 19.

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1. All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities.
2. No one shall be discriminated against in political, social or economic life for any reason whatsoever.

For anyone found guilty of promoting a fascist or other totalitarian system or of inciting hatred based on national, ethnic, racial or religious differences, or for lacking any religious denomination, Article 256 of the Polish Criminal Code imposes a fine, a restriction of liberty or imprisonment for a maximum of two years. For anyone found guilty of publicly insulting a group or a particular person because of national, ethnic, racial or religious affiliation or because of the lack of any religious denomination Article 257 imposes a fine, a restriction of liberty or imprisonment for a maximum of three years. The construction of a hate speech clause beyond incitement, which failed in Hungary, had not been challenged before the Constitutional Tribunal in Poland until very recently, and it covers insults.

As in the case of the other countries discussed here, Poland has not ratified the Protocol to the Cybercrime Convention.[109] A Government Plenipotentiary for Equal Treatment has recently been appointed and the National Program for Counteracting Racial Discrimination, Xenophobia and Related Intolerance (which this appointee coordinates) has been extended until 2013. Similarly, the process of transposing EU equality directives has taken much time.[110]

4.3 Amendments to the Criminal Code

Considering the particular problem of hate speech in Poland, several NGOs and governmental agencies have drafted amendments to the Criminal Code. For instance, LGBT organisations, drawing on Swedish and Canadian experiences, suggested the addition of sexual orientation to the bases to be protected against hate speech.[111] Thus, the inclusion of sex, gender identity, age, disability and sexual orientation in Article 119(1) was proposed to define a hate crime, along with the 'traditional' grounds of nationality, ethnicity, race, as well as political and religious beliefs. It was also proposed that sexual orientation should be brought within the scope of Articles 256 and 257.[112] In drafting the proposals, NGOs and scholars noted the need for amendments to bring the Code into line with the EU anti-discrimination directives.

As in the case of the Hungarian discussion of the criminal clause in relation to hate speech, the very wording of 'incitement' (*nawoływanie do nienawiści*) in Article 256 of the Criminal Code was questioned as 'enigmatic'. A scholar of criminal law, Lech Gardocki, has suggested

[109] Additional Protocol to the Convention on Cybercrime (n 33).
[110] On 4 May 2010, the European Commission referred Poland to the Court of Justice of the EU for incorrectly implementing Directive 2000/43/EC (n 30). The Commission pointed out that Poland had not transposed the Directive outside the field of employment.
[111] For accounts of homophobic hate speech in Poland, see Jerzy Szczęsny, 'Retoryka antyhomoseksualna w Trzeciej Rzeszy' in Mirosław Wyrzykowski and Adam Bodnar (eds), *Przekonania moralne władzy publicznej a wolność jednostki* (Uniwersytet Warszawski 2007) 55; Robert Biedroń, 'Wprowadzenie do raportu' in Greg Czarnecki (ed), *Raport o homofobicznej mowie nienawiści w Polsce* (Kampania Przeciw Homofobii 2009) 7.
[112] See Eleonora Zielińska, 'Opinia w sprawie projektu zmian kodeksu karnego' in Czarnecki, ibid 77.

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that it is not clear why the legislator does not penalise the very fact of calling for hatred (*wywoływanie nienawiści*).[113]

In 2008, the Polish Parliament discussed a project to amend the hate speech legislation, based on a clause structured in four parts. On 26 November 2009, the conservative President of Poland, Lech Kaczyński, signed the bill, which came into force on 8 June 2010. A new version of Article 256 of the Criminal Code contains a clause, constructed in an essentially different mode from its counterparts in Hungary and the Czech Republic, that links hate propaganda and totalitarian symbols:

> §1. Whoever publicly promotes a fascist or other totalitarian system of state or incites hatred against the background of differences in nationality, ethnic, racial, or religious affiliation or because of the lack of religious beliefs shall be subject to a fine, restriction of liberty or imprisonment up to two years.
> §2. The same penalty shall be applied to a person who, in order to disseminate, produces, records or brings, acquires, holds, owns, shows, transports or transmits a printed, recorded or other item, with a content described in §1 or containing the symbols of fascist, communist or other totalitarian regimes.
> §3. An offence specified in §2 should be considered as no[t] committed if the described actions were performed … [for] artistic, educational, scientific, or collecting purpose[s].
> §4. In the event of a conviction for an offence referred to in §2, the court shall order the seizure of objects referred to in §2, even when the objects were not in the property of a perpetrator.

Thus, section 1 of the amended Article 256 of the Criminal Code actually constitutes the incorporation of the previous variant of the article. It was perhaps to be expected, but it is nonetheless unfortunate that the conservative Polish legislator ignored the proposals of the NGOs and omitted the suggested grounds of age, gender, sexual orientation and disability from protection against hate speech. Considering the enormous scope of homophobia in Polish political populism and the aggressive role of a number of Catholic organisations and priests on this issue, the legislator's response leaves much to be desired. Section 2 of the Article is drafted in a characteristically clumsy and populist manner. What the Polish legislator performed is essentially the copying-and-pasting of an analogous clause, on pornography, from Article 202 in the Criminal Code. This approach neatly illustrates the misunderstanding among political authorities of the problem of hate speech. It is unclear how the possession (especially understood in its classical civil law meaning) of 'hateful items' contributes to the incitement of hatred.[114] In addition, the insertion of the clause on fascist and communist (as well as the unclear and overly broad 'other totalitarian') symbols in the scope of the article on hate speech is in itself disputable. It appears even more disputable in light of the recent judgment of the European Court of Human Rights on Hungarian communist symbols (the *Vajnai* case) referred to above.[115] It is unclear, for example, if wearing a T-shirt with an image of Che Guevara or a symbol of the North Korean Republic becomes a criminally punishable offence under the clause.

[113] Lech Gardocki, *Prawo karne* (CH Beck 2006) 297.
[114] For a detailed analysis of the amendment, see Mateusz Woiński, 'Projekty nowelizacji art. 256 k.k.' in Roman Wieruszewski and others (eds), *Mowa nienawiści a wolność słowa. Aspekty prawne i społeczne* (Wolters Kluwer Polska 2010) 21.
[115] See text at nn 88–92.

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Moreover, rather oddly, the reference to the *collecting* activity in section 3 as a legitimate mode of possession and purchase of totalitarian material gives the green light to what is officially prohibited in France and several other EU states, namely the trade in Nazi memorabilia. The protection of the artistic use of hateful utterances or symbols in section 3 remains ultimately vague. Would it, for instance, mean that in the Polish context, the Czech case involving criminal sanctions against the leader of a neo-Nazi band[116] would have failed because the hateful utterances also constituted artistic activity?

4.4 The Constitutional Tribunal

Unlike the position in the Czech Republic and Hungary, the Polish Constitutional Tribunal entered the debate on hate speech only very recently, in 2011. Although in 2008 it found another provision in the Criminal Code to be unconstitutional – the so-called 'slander of the Polish Nation' (*pomówienie Narodu Polskiego*) clause – the judgment does not deal directly with hate speech and the decision to strike out the clause was based exclusively on procedural grounds rather than per se incompatibility with freedom of speech.[117]

In its 2011 judgment, the Tribunal was asked to assess the compatibility of the latest version of Article 256 of the Criminal Code.[118] While sections 2 and 3 of Article 256 (cited above) were upheld as constitutional, the part of Article 256(2) containing the wording 'fascist, communist or other totalitarian symbols' was ruled to be unconstitutional. Moreover, the Tribunal undertook a remarkable exercise in summarising the militant narrative of various European courts (citing primarily German and Hungarian case law, but also providing legal examples from Albania, Lithuania, Russia, Belarus and Slovakia), including the latest judgment of the European Court of Human Rights on totalitarian symbols in *Vajnai*.[119] The Tribunal specifically considered the similarity between legal regulation in Hungary and Poland. Making reference to the judgment in *Vajnai*, the Tribunal stated that the use of symbols which have multiple meanings may not be subject to criminal liability.[120] Furthermore, the Tribunal considered the chilling effect of the specific provision on totalitarian symbols as overly broad, vague and capable of strengthening extremist political factions by enabling them to use examples of the state's repressive methods to gather new supporters.[121]

4.5 An Overview of Other Hate Speech Issues before Courts

Following this analysis of the amendments to the Criminal Code, it is important to underline that the main problem with the country's response to hate propaganda lies not in inadequate legal

[116] See text at nn 48–49.
[117] Judgment of the Constitutional Tribunal (*Trybunał Konstytucyjny*) K 5/07 (19 September 2008). For an examination of the judgment, see Belavusau (n 17) 18–19.
[118] Judgment of the Constitutional Tribunal (*Trybunał Konstytucyjny*) K 11/10 (19 July 2011).
[119] Part III of the decision is even specifically entitled 'The Standards and Jurisprudence of Other European States and of the European Court of Human Rights' (*Standardy i orzecznictwo innych państw oraz Europejskiego Trybunału Praw Człowieka*).
[120] Judgment of the Constitutional Tribunal K 11/10 (n 118) paras 3.3.3 and 5.1.2.3.
[121] ibid para 5.1.2.5.

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drafting but rather in its indecisive implementation by Polish courts and prosecutors. It is arguably scandalous that the country's most aggressive, enormously influential and highly visible hate propagandist, Radio Maryja, an ultra-Catholic radio station and media group, not only continues to operate, but has to date avoided criminal prosecution.[122]

Founded in 1991 in Toruń, Radio Maryja has been run by Tadeusz Rydzyk, a highly controversial individual whose statements have been met with concern even by the Vatican. This radio station, with an audience of millions, has become known for the expression of nationalist, anti-Semitic, anti-Roma, anti-socialist, anti-German, anti-EU, anti-feminist and homophobic prejudice. A report of the Council of Europe (CoE) stated that Radio Maryja has been spreading explicitly (although less openly in recent years) anti-Semitic remarks.[123] However, the National Broadcasting Council's investigation into Radio Maryja and related media found no case to answer.

The CoE report noted that although the National Broadcasting Council operates a complaints mechanism, it has had to deal with only one case of racial discrimination, which involved a pun on the name of a football club and the word 'Jew'.[124] The Council took action on this matter. Nonetheless, the dearth of complaints concerning matters related to racism and intolerance reflects a lack of confidence in the complaints mechanism or a lack of awareness of its existence.

One of the most striking features of the Polish hate speech situation in general is the unwillingness on the part of the authorities (mainly prosecutors) and resistance by the courts to proceed with cases involving Catholic priests or organisations.[125] The Catholic church in Poland is effectively a sacred cow and benefits from a disproportionate level of protection under freedom of speech and religion. The level of obscurantism perpetrated by many priests and religious public figures, as well as the degree of popularity of political movements appealing to religious morality in Poland, is truly remarkable for a twenty-first century secular state in the EU.[126] In a 2008 interview with one of the Polish channels (TV Polsat) during a meeting organised against a demonstration by LGBT organisations in Kraków, a priest, Rafał Trytek, announced that he 'hopes that Poland will return to the bright days when faggots were burned at the stake in the market'. Typically, he has never been prosecuted under the criminal clause on incitement to hatred, despite the fact that the video with his interview is still easily downloadable on the internet.[127]

[122] For the monitoring of hate speech utterances on Radio Maryja, see http://www.radiomaryja.pl.eu.org.
[123] ECRI, 'ECRI Report Poland (Fourth Monitoring Cycle)' 15 June 2010, 26.
[124] ibid.
[125] For the monitoring of hate speech instances, see the reports of the Open Republic Association against Antisemitism and Xenophobia, http://or.icm.edu.pl
[126] On the peculiarities of the Polish attachment to the church and the role of religion in the national identity of Poles, see Mira Marody and Sławomir Mandes, 'On Functions of Religion in Molding the National Identity of Poles' (2006) 35 *International Journal of Sociology* 49. The authors analyse historical relationships between religion and the formation of nationhood. They argue that the formation of nationhood in Europe was related to the growth of 'secular rituals' that could not develop in Poland because of its prolonged lack of political sovereignty. Religion was, and still is, the main source of collective rituals through which national identity was formed and is sustained in Polish society.
[127] Available at http://www.youtube.com/watch?v=tSdPojDhaYY (statements in Polish: '*Policja powinna chronić rynek przed marszem pedałów i innych zboczeńców* […] *jeszcze w średniowieczu ludzi o takich skłonnościach*

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Similarly, Polish nationalist organisations (All Polish Youth, League of Polish Families and Polish National Rebirth, to name a few) often appeal to ultra-Catholic rhetoric, exploiting the stereotypes of xenophobia, anti-Semitism, anti-Romanyism and homophobia. Prosecutions under the criminal 'incitement to hatred' clause have been rare. In one such case an anti-Semitic campaigner, Kazimierz Świtoń (also known as an opposition activist during the communist epoch) was found guilty by the Regional Oświęcim Court of inciting hatred of Jews and Germans. In January 2000 he received a six-month jail sentence, suspended for two years, for distributing anti-Semitic leaflets at Auschwitz two years earlier. The case had been brought not by the prosecutor but by a local NGO. In June 2000 his punishment was reduced to a mere month-long suspended sentence. In December 2000 Mr Świtoń was acquitted of earlier charges. On leaving the court he pledged to continue his struggle against 'Jewish chauvinists'.[128]

The 2010 ECRI report criticises a judgment of February 2007, in which the Supreme Court (*Sąd Najwyższy*) decided that holding a placard reading 'We shall liberate Poland from [inter alia] Jews'[129] did not amount to an offence under Article 256 of the Criminal Code. To reach this conclusion the Court referred to Article 54(1) of the Constitution – that is, to the constitutional protection of freedom of speech. The ordinary meaning of the word 'liberate', and the use of the indicative as opposed to the imperative, showed no intention to incite national hatred, according to the Court.[130] In its ruling, the Supreme Court clarified the wording of Article 256 of the Criminal Code, in particular the term '*nawoływanie'* (incitement), constructed in all three countries under examination in a way similar to the German term '*Volksverhetzung*' (literally 'incitement to popular hatred'):[131]

> Incitement to hatred on grounds listed in Article 256 of the Penal Code – including on the grounds of national differences – leads to the types of statement which arouse strong feelings of dislike, anger, lack of acceptance or outright hostility to individuals or social groups or religious groups, including also, due to the form of expression, exacerbate, and which indoctrinate these negative attitudes and by their virtue underline the privileged status, the superiority of a specific nation, ethnic group, race or creed.

Thus, the Court placed the emphasis in the definition of incitement on the concrete intention (*dolus directus*).

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palono na stosach, […] *może powrócimy do tych wspaniałych czasów jeszcze i tych ludzi będzie się palić na stosach. Miejmy nadzieję*!').

[128] For details see Marcin Kornak, 'Brunasta księga – Katalog wypadków' (2000–01) 12 *Nigdy Więcej*. See also an article in a Polish newspaper, 'Świtoń jest winny', *Rzeczpospolita*, http://new-arch.rp.pl/artykul/258926_Switon_jest_winny.html.

[129] '*Wyzwolimy Polskę od euro-zdrajców, Żydów, masonów i rządowej mafii*'.

[130] ECRI Report on Poland (n 123) 14.

[131] '*Nawoływanie do nienawiści z powodów wymienionych w art. 256 k.k. – w tym na tle różnic narodowościowych – sprowadza się do tego typu wypowiedzi, ktore wzbudzają uczucia silnej niechęci, złości, braku akceptacji, wręcz wrogości do poszczególnych osób lub całych grup społecznych czy wyznaniowych bądz też z uwagi na formę wypowiedzi podtrzymują i nasilają takie negatywne nastawienia i podkreślają tym samym uprzywilejowanie, wyższość określonego narodu, grupy etnicznej, rasy lub wyznania*': Decision of the Supreme Court (*Sąd Najwyższy*) IV KK 406/06 (5 February 2007).

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In March 2002 the Supreme Court clarified the notion of 'propagate' or 'promote' (*propaguje*) in Article 256 of the Criminal Code. A regional court referred to the Supreme Court for an opinion, inquiring whether the lexical change in the wording had legal consequences. The former Article 270(2) of the Criminal Code 1969 referred to the verb '*pochwala*' (literally 'appraise') rather than '*propaguje*'. The case before the regional court was brought against neo-fascists who organised a meeting in a local club, during which Nazi symbols were used and the dissemination of totalitarian propaganda took place. The participants used symbolic greetings with the right hand, accompanied by salutes of '*Sieg Heil*' and '*Heil Hitler*'. The court inquired if the notion of 'promotes' covers the approval (*pochwalanie*) of fascist or other totalitarian orders, apparent in the demonstration of the swastika, gestures of fascist greetings and so on, only when it is accompanied by the public popularisation of such an order (meaning propaganda). In its Resolution, the Supreme Court noted that everything depends on the unique circumstances of a specific event, which, as in this case, determines whether particular conduct constitutes a public presentation of an order and whether it is taken with the intention of the explicit popularisation of this system.[132] The crime can be committed only with an intention to publicise approval of such a system. As a result, the Court held as follows: 'To "promote", within the meaning of Article 256 of the Penal Code, means any conduct consisting of a public presentation of a fascist or other totalitarian system of the state, with the intent of persuading the public.'[133]

The Court also mentioned that it is indisputable that hate speech should be regarded as an exception to the constitutional protection of freedom of expression, with regard, inter alia, to the practice of the European Court of Human Rights. Thus, 'Strasbourg law' (with its *militant* ethos of the right of freedom of expression) was positioned as a mandatory free speech model for Poland.

Unlike the position in the Czech Republic and Hungary, until very recently the Constitutional Tribunal of Poland had not been involved in clarifying the hate speech provisions. However, Polish case law has involved a number of attempts to prosecute hate speech on the internet. Rafal Pankowski and Marcin Kornak detail at least three investigations – in Kielce, Łódź and Rzeszów – regarding anti-Semitic material on the internet. One such investigation, in October 2000 in Kielce, ended with a trial and a ten-month suspended sentence for the perpetrator. Nonetheless, the authors argue that to date there have been no coordinated efforts to curb hate speech on the internet.[134]

Yet the hate speech jurisprudence of lower courts appears to be inconsistent. In this respect the District Court of Wrocław recently delivered a peculiar judgment.[135] The defendants – members of

[132] Resolution of the Supreme Court (*Sąd Najwyższy*) I KZP 5/02 (28 March 2002).
[133] Statement of the Court in Polish: '*Propagowanie, w rozumieniu art. 256 k.k., oznacza każde zachowanie polegające na publicznym prezentowaniu faszystowskiego lub innego totalitarnego ustroju państwa, w zamiarze przekonania do niego*' (ibid).
[134] Rafał Pankowski and Marcin Kornak, 'Poland' in Cas Mudde (ed), *Racist Extremism in Central and Eastern Europe* (Routledge 2005). On the recent NGO initiative to use an electronic filter to identify hate speech on the internet, see also Joanna Klimowicz, 'Obieg mowy nienawiści w internecine', *Gazeta Wyborcza*, 18 April 2011, http://wyborcza.pl/1,75478,9459039,Obieg_mowy_nienawisci_w_internecie.html.
[135] Judgment of the District Court of Wrocław, Second instance, IV Ka 978/10.

the far-right organisation, National Rebirth of Poland – were sentenced by the Regional Court Wrocław-Śródmieście for inciting racial, ethnic and national hatred, by shouting and presenting slogans during a demonstration, including 'White power', 'Europe for Whites, Africa for HIV'. They also displayed Nazi symbols and symbols promoting a totalitarian system. The District Court ruled that the defendants had not violated Article 256 of the Criminal Code, as their behaviour was motivated only by patriotic feelings, by their wish to emphasise that while various races are equal to each other they are nevertheless different, and by their fascination with the ideas of race theorists such as Arthur Gobineau. The defendants were found not guilty. The verdict overruled the judgment of the first instance court – the Regional Court Wrocław-Śródmieście of 1 June 2010.

To sum up, the Polish case demonstrates a belated engagement of the Constitutional Tribunal in the issue of hate speech (unlike in the Czech Republic and Hungary), as well as the confusing drafting of the incitement clause in the latest version of the Criminal Code. Hate speech in Poland is often informed by religious obscurantism in addition to the rhetoric of the nationalist right, while the practice of lower courts has been inconsistent in prosecuting the virulent haters.

5. CONCLUSIONS: A SUMMARY OF THE MILITANT IN THE TRANSITIONAL MODELS

In all three CEE countries examined, the 'transitional' constitutional doctrine echoes two hate speech models ('permissive-American' and 'military-European'). However, the actual involvement of the higher courts with the issue has varied substantially. Furthermore, this comparison reveals that a divergent degree of constitutional involvement has not radically affected the number of hate speech prosecutions. They remain marginal (though to various extents) in all three countries.

Despite the considerable interest of local scholars in the American model,[136] the Czech Republic chose a pragmatic construction of hate speech that followed the mandatory law of the Council of Europe and the EU. The standard developed by the Czechoslovak Constitutional Court in 1992 is significantly more prohibitive than the American test. The discussion of content restrictions is linked to the ethos of militant democracy, which deliberately singles out Nazi and communist ideologies from the market place of political ideas as incompatible per se with democratic foundations.[137] Freedom of speech is appraised as egalitarian in contrast with a libertarian right. From the 'Strasbourg viewpoint', a punishment of three to eight years' imprisonment for the unlawful activity appears excessive, considering the preference for tort-based compensation rather than criminal convictions, as in most hate speech judgments. However, in

[136] See, inter alia, Jan Filip, 'Dogmatika svobody projevu z hlediska teorie, legislativy a soudní praxe' (1998) 4 *Časopis pro právní vědu a praxi* 618. The author engages in a thorough normative discussion of the fighting words and clear and present danger tests. See also two books on freedom of speech, extensively introducing the First Amendment judgments of the US Supreme Court for a Czech readership: Petr Jäger and Pavel Molek, *Svoboda projevu: Demokracie, rovnost a svoboda slova* (Auditorium 2007); Michal Bartoň, *Svoboda projevu a její meze v právu České republiky* (Linde 2002).

[137] This point requires a disclaimer on a certain inconsistency in anti-communist stance. For example, the Communist Party of Bohemia and Moravia (which did not even drop the name 'communist' from its title) is not only legal but is currently the third most popular party.

hate speech cases, the European Court generally leaves the issue to the margin of appreciation of the state. In this respect, both Czech legislators and judges follow the most restrictive approach of militant democracy in neighbouring Germany and Austria.

Furthermore, the Czech approach differs from the judgments of the Constitutional Court of Hungary, which has attributed the wording of pure 'public expressions of sympathy' to the scope of the protected right of freedom of expression. However, it would be too much of an exaggeration to argue that the Hungarian Court has opted for the non-mandatory 'American' model, setting militant democracy aside for the sake of liberal-democratic transition. In fact, the Hungarian hate speech saga illustrates an unusual attempt to marry the European and American models. A hate speech provision *à la hongroise* exclusively covers incitement to hatred, arguably incorporating the limits of the American 'clear and present danger' test. At the same time, the incitement has been constructed in a German fashion, embracing the concerns of militant democracy and preoccupations about growing nationalism. The Hungarian concept of incitement is undoubtedly broader in scope than the American test of content neutrality. In fact, the content does matter for the assessment of criminal prohibition and, in this sense, the Hungarian vision does not contradict the mandatory European model. On the contrary, the legislation and the earlier engagement of the Hungarian Constitutional Court with the issue of communist symbols appear too strict even for a European model. The decision of the European Court of Human Rights in *Vajnai v Hungary*, inter alia, suggests that communist propaganda is no longer a danger for a 'militant' Central European democracy and the criminal restriction on the use of communist symbols in public falls into the category of the disproportionate.

In contrast, the Polish Constitutional Tribunal has not burdened itself until very recently with the issue of hate speech vis-à-vis the constitutional protection of freedom of expression. In its 2011 decision, it struck out just the part of a criminal (hate speech) provision on totalitarian symbols (motivated by the *Vajnai* decision of the European Court), while reading the rest of the hate speech provision in the Criminal Code in terms of the militant democratic narrative. The Supreme Court has provided some clarification of the issue. Like the Czech Republic and Hungary, the legislators constructed incitement to hatred in a way reminiscent of the German *Volksverhetzung* (part and parcel of militant democracy in German tradition). The recent drafting of the criminal provision on hate speech in Poland leaves much to be desired. The Polish legislator not only incorporated the prohibition of totalitarian symbols into the scope of hate speech, but formulated the provision in a semantic mode borrowed from a clause on pornography, preferring to remain blissfully unaware of religious obscurantism and homophobia in Polish society.

Perhaps the most unexpected paradox of the present survey is that the distinct involvement of the constitutional courts in these three countries arrived at relatively similar results as to the level of the actual invocation of the criminal provision on incitement before the ordinary courts. This statement will require further detailed research at a substantially different judicial level, extending beyond the scope of the present article. Nonetheless, it appears that in all three countries the invocation of the hate speech provision before the local courts has been uncommon, albeit for different reasons. Likewise, Jiří Přibáň and Wojciech Sadurski maintain that hate speech laws in CEE

have been apparently under-enforced, and that this general awareness of under-enforcement diminishes the incentive to launch a strong constitutional challenge to anti-hate speech laws:[138]

> Under-enforcement is probably best explained by a composite of four factors: a genuinely liberal belief that prosecution for hateful speech may spill over into the silencing of speech which, though controversial, is [a] legitimate contribution to public discourse; an understandable aversion, based on experiences in the 'bad old days', to any restrictions on speech; an unwillingness to provide racists and other extremists with 'free publicity' in the form of a public trial; and a degree of deplorable public tolerance for anti-Semitic and other racist or xenophobic opinions.

The present study does not contradict this conclusion. At the same time, I see a somewhat nuanced explanation with regard to the three main actors in the process of statute enforcement: (i) constitutional courts, (ii) ordinary courts and prosecutors, and (iii) NGOs or governmental anti-discrimination bodies. The Czech Republic has been relatively more successful in terms of hate speech prosecution as a result of the active role of NGOs (anti-racist and Romani organisations) and the explicitly secular ethos of the transformation period. The lack of success in Hungary relates not so much to the fact that the Hungarian Constitutional Court has partially invoked the American model – limiting the provision on hate speech to the category of 'incitement'; rather, the problem should be attributed to the fact that ordinary courts have conceived those constitutional judgments, and the 15 years of back-and-forth discussions between Parliament and the Constitutional Court, as a confusing incentive to withdraw from deliberations on the incitement of hate speech. Paradoxically, therefore, the activist role of the Constitutional Court has given rise to passivity by the local courts. On the other hand, Poland is an example of the, until recently, passive role played by both the Constitutional Tribunal and the ordinary courts and prosecutors. In a climate in which the constitutional body had not (until 2011) launched a direct constitutional challenge to the statutory prohibition of hate speech, the courts and prosecutors should have been theoretically more willing to enforce the criminal provision in comparison with their Czech and Hungarian counterparts. However, this has not happened. Moreover, Polish under-enforcement can additionally be attributed to a political populism based on strong conservative sentiments among the many religious Poles. The virulent producers of hate speech, such as the 'journalists' of Radio Maryja, have never been prosecuted, and neither have dozens of popular politicians who have been advocating ethnic, anti-Semitic, anti-Romani and homophobic hate speech in recent years. In an environment where individual plaintiffs are often unavailable, the problem of under-enforcement should be addressed via the mobilisation of social movements to proceed with hate speech cases up to the higher courts.

The proposition that an active role for NGOs and governmental anti-discrimination organisations is necessary to turn the situation around is valid for the whole CEE region. In the context of the countries considered in this article, the preferable model for the enforcement of hate speech

[138] Jiří Přibáň and Wojciech Sadurski, 'The Role of Political Rights in the Democratization of Central and Eastern Europe' in Wojciech Sadurski (ed), *Political Rights under Stress in 21st Century Europe* (Oxford University Press 2006) 196, 224.

statutes requires the incorporation of the instrumentalisation techniques stemming from post-modern legal movements. This includes contextualising claims before courts with the victims' accounts, historical background and a description of the social mechanism of exclusion of minorities through hate speech utterances.[139]

In synthesis, the way in which CEE post-communist constitutionalism has interplayed with the mass traumas pertinent to hate speech demonstrates that the Czech Republic, Hungary and Poland have largely mainstreamed militant democracy as a key element of their transitional democratisation.

[139] For a detailed account, see Uladzislau Belavusau, 'Instrumentalisation of Freedom of Expression in Postmodern Legal Discourses' (2010) 3 *European Journal of Legal Studies* 145.

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