VI. rész – Part VI.

Hate Speech In Hungary

(Angol nyelvű összefoglaló – English summary)

I. Summary of Background of the Research Topic
[Subject of the Book and the Defined Research Task]

According to the generally accepted definition, society is any organized human community held together by a connecting element. Consequently, if we have to give a short definition of the state as an actual entity, we could say that it is a relatively constant order of people's coexistence in a society defined along a specific set of regulations. In this order – for the sake of "relative constancy" – a set of rules adequate to the level of development and need for regulation of the society at a given time and era has to be established. The idea that this system of rules – i.e. the enforcement and insurance of behavioral norms known to and acknowledged by everyone – is an indispensable pre-requisite of human coexistence has been part of the human cultural heritage since the beginnings.[609] Rules not meeting this requirement would inevitably lead to discontent, whereas the society would face an "identity crisis", because the competent body fails to respond to its needs. All this is the result of the necessity that if someone cannot calculate the consequences of his or her actions in advance, foresight and the corresponding behavior becomes impossible in all areas of life. According to Elliott Aronson, this is the point, where instinctive improvisations replace rational and purposeful actions.[610] Naturally, the said need for safety is formulated against the trustees of power. "Implementation of the constitutional state is a process. It is the constitutional duty of the state organizations to work to this end."[611] When establishing the system of regulation, the societal expectations determined along the constantly changing requirements of constitutional democracy must be met while keeping this in mind, by following basic values representing the relationship between the state and the individual, comprehensive legal regulation of the broad range of societal relations, the binding nature of both material and procedural legal provisions to everyone, in a way that the society is generally characterized by the respect for law and legal order.

The analysis of this societal expectation and the obligation to comply with it can be identified also in the area covered by my book. One of the standards of the constitutional democracy is not only the way how the rights to individual liberty are implemented, but also the system of guarantees, along which the basic or

609 Horkay-Hörcher Ferenc, *Előadások a XIX. és XX. század állambölcselete köréből*, Budapest, Szent István Társulat, 2001, 9–93.

610 Elliott Aronson, *A társas lény*, KJK–KERSZÖV, 2000.

611 236/A/2008. AB resolution – parallel explanation of László Kiss, member of AB, II/1. Abh. 11/1992., Abh. 77/1992., Abh. 80/1992.

quasi basic rights guaranteed for the individuals can work. It is a question, which basic rights can be or have to be given priority against others, and which rights must not be exercised to the expense of others.

The Hungarian Criminal Code (hereinafter referred to as Btk.) reflects the state and sentiment of the given society of a given time, so it is possible that in different times and different societies certain actions have to be judged differently, or need not to even be judged at all. During the period of transition we were facing dramatic changes in Hungary, which required specific legislative approach, and at the same time had a profound impact on the people's way of thinking. In the times of political changes, the boundaries of free speech are determined either extremely broad or extremely narrow: extremely narrow, when a democracy is being transformed into dictatorship, and extremely broad, when a dictatorial order is being transformed into a democracy. It is only natural that right after overthrowing a totalitarian regime, one of the most important means of preventing restoration is to ensure virtually indefinite freedom of speech. On the other hand, in an established and stabilized democracy – such as Hungary has been for years – the boundaries of free speech have to be drawn within much narrower limits – by keeping in mind the rightful interests of individual groups of society – then in times directly following the transition. This train of thought – also highlighted by the law-maker in the preamble of the latest bill has finally appeared in both minority and parallel opinions of the constitutional court. The most firmly formulated opinion is that of László Kiss, judge of the Constitutional Court: "Can we reach a point, when an important institution of the constitutional democracy [in this case the freedom of opinion as an actually and relevantly unlimitable basic right] becomes dangerous to the constitutional democracy itself?"[612] Based on certain recent events, my answer is yes.

Today in Hungary we are facing a paradoxical situation, when in one part of Hungary Europe's cultural capital is being built, in the other part – under the protecting shield of freedom of speech and opinion – the feelings of certain groups of society are brutally hurt, in many serious cases these groups are kept under threat. In 2001, when I first started dealing with the issue of penalizing verbal abuse, I thought it was important for the protection of the communities' interests only. Unfortunately, today a new argument must be mentioned besides – or should I say ahead of – the original one: extremist groups not discarding even physical abuse are more and more markedly present in our everyday life, and the authorities are helpless. Many think that the reason for this helplessness is the lack of consequent interpretation and application of the law, while according to others the imperfect legal environment. It is a fact that we are unable to efficiently prevent their forging ahead and development. Sanctioning verbal abuse is now

612 95/2008 (VII. 3.) AB resolution – parallel explanation of László Kiss, member of AB, II/3.

necessary not only to protect the honor and human dignity of the communities, but also because – together with other legal provisions – it would be an efficient means to force back radical groups saluting dictatorial regimes, following and wishing for the restoration of their ideology.

The goal of my book is to support the premise that limitation of the freedom of speech is justified for the honor, physical integrity and human dignity of members or groups of the society. This can only be done by engineering new complex legal means, reconsideration of the available set of legal provisions, resolution of the interpretation uncertainties and creation of the missing regulatory structure. Edified by the resolutions of the Hungarian Constitutional Court (hereinafter referred to as AB) regarding provocation, the question had to be rephrased with the need of preferring human dignity as a protected legal object instead of the protection of public order. Resolution 95/2008 (VII. 3.) of the AB verified that the legislative process is on the right track, which – despite the rejection – must be followed on. My book addresses the issue of how.

In accordance with this, the identified *research task* is an exploratory analysis of legal and legal policy events, trends and directions related to actions violating the dignity of communities, to find an answer to the question, whether it is necessary, and if yes, whether it is possible, and if yes, what are the means of sanctioning verbal and non-verbal aggression brutally violating the human dignity of certain groups of the society.

II. Methods Used during the Preparation of the Book
[Research Methodology]

In order to complete my research task while keeping the objective in mind, I applied the following research methods.

For *theoretical substantiation* of the topic I used the Hungarian and international literature, itemized legal material, as well as the parliamentary and judicial practice. Exploration of the necessary legal literature and legal sources is the result of several years of collection, in the course of which most of the said literature was processed. For my research I used the related materials in the University Library and the Library of the Parliament, with the help of which I had the opportunity to study domestic and international literature.

During the analysis of the topic I also studied resources available on the internet. In the course of this activity I considered very important to use only documents that are relevant, verified according to the widely used scientific rules and/or published on the official websites of the various international organizations.

As part of my research I spent a month in the United States within the frame of the International Visitor Leadership Program, where I had the opportunity to study the American justice system and legislative mechanism.

I also put significant emphasis on the analysis of the most important related verdicts found in the data repository of the Hungarian Supreme Court, as well as on the analytic assessment of the individual legal provisions, bills and the original parliamentary debates.

Although the analysis of the legal sources and of the circumstances of establishing certain standards, as well as the introduction of the legal cases gives a descriptive nature to certain chapters, I found this type of analysis also necessary, with respect to the fact that the comparative legal and analytical method s necessary when exploring the interdependencies. In the course of this, I dedicated special attention to dealing with the "development curve" spanning between the AB resolutions regarding provocation and those related to verbal abuse, and to identifying the directions of international ad domestic legal development.

In the course of analyzing *practical aspects* of the addressed topic I used the results of my own research, which means that my findings are based on theoretical and practical experience. As representative of the Parliament and member of the Constitutional, Justice and Procedural Committee, I had the opportunity to form the penal and civil regulatory concept of verbal abuse, and one of the authors of the criminal law bill and the bill about the amendment of the Constitution. Hence my book is the result of my research and my activities as a professional politician.

III. Brief Summary of the Book

My book contains five main parts built one on another.

III.1. Introduction and Definition of Terms

In the first part of my book – following the first chapter addressing the basic thoughts of the topic – I clarify the most important terms and concepts, because the analytic assessment and scientific analysis of the topic cannot be carried out without defining the terms the current regulatory concept is based on. The second part addresses the tights of communications and the right to live in human dignity – in individual and group contexts, followed by analyzing the conflict between the two rights during societal coexistence. The thoughts of John Milton and John Stuart Mill have to be analyzed, because the origin of the basic right tests can be derived from these thinkers. Freedom of opinion – as a first-generation political liberty born against censorship, demanded by almost all civil revolutions – has a distinguished position among the basic rights. In this regard, the AB expressed the following: the freedom of opinion – which protects the opinion, i.e. the criticism, regardless to its value or truthfulness – functions as a mother right of the basic communications right, through which, by conflicting damaging and constructive thoughts and opinions, the idea expected by and acceptable to the society can be established. However all this can only be true, if the two communicating parties are in the same position, show the same strength and have a real dialog. This is why the intangibility of the basic communications rights cannot always e the starting point; the limits of these rights should be marked by the answer to the questions, how far the individual liberty can be justified, and where is the point, where exercising this right starts severely impeaching others. Consequently, the following must be emphasized: criticism can and must be sanctioned, when it is no more an argument, but becomes an abusive outfling. The right to live and to human dignity is inseparable and unrestricted universal basic human right, a transcendent fact deductible from the existence itself.[613] As a consequence, human life and human dignity – both in the catalogue of the human rights and in the modern constitutions – are not merely basic rights, but intangible values defined as sources of rights,[614] positioned practically above the right. The law must always ensure that these intangible values are passively respected and actively protected.

613 Horváth Dóra, Véleménynyilvánítás szabadsága kontra gyűlöletbeszéd, *Studia Iuvenum Iurisperitorum*, 2004/II, 41–70.

614 Vö. Kilényi Géza, Az Alkotmány egyes (alapelvi, alapjogi) rendelkezéseinek jogi jellege, *Társadalmi Szemle*, 1995/11, 44.

The theoretical substantiation attracts the attention to the fact that in today's collective societal consciousness, there are life situations during societal coexistence, when the two mentioned basic rights collide with each other. The desired situation is that the two rights completes each other, while in case, if someone misuses one of these rights and by doing so violates the basic rights of others, legislation must respond this phenomenon, keeping in mind that criminal restriction concerning the basic right can only be constitutional, if its objective is to prevent other basic rights from being diminished.[615] Since the collision of the basic rights relevant from the aspect of my topic is manifested as a main rule in violating the human dignity of communities, in my book I felt necessary to define such actions committed against the dignity of communities and against certain groups of the society.

A community, which is a legal and societal entity with its own internal norms and values can be defined as a group of individuals, the members of which feel that they belong together with each other and are different from outsiders. Acknowledging merely human characteristics as a group forming factor, which characteristics equally define the identity of both the individuals and the group,[616] belonging to the group defined this way is part of the sum of characteristics belonging to the individual, while at the same time it also belongs to the personality rights. There is a manifestation of the human dignity of individuals forming a community and living in close relation with each other which manifestation only exists by the belonging of the given individual to that community. Consequently, the dignity of the communities means the individual dignity of the community member, which dignity exists as a result of the fact that the given individual is the member of that community. This must be protected, just as the individual dignity of the person separated from the community. Despite this, our Constitution connects the concept of human dignity exclusively to the individual, but after determining its relevant content, the body failed to provide with a dogmatic definition of the dignity of the communities, and to unfold the relating basic right protection. This causes the problem. Our legal system ensures protection of the dignity of the communities only in an indirect way, only to the extent and in case, if the given violation of the law also results in the violation of individual interests, and the offended party personally enforces his or her claims via civil or criminal law proceeding.

The question is, how to resolve the anomaly that while a sum of individuals with registered members (and with legal personality) has the opportunity to claim

615 On the possibility of basic right limitation, see 30/1992 (V. 26.) AB resolution.

616 In its practice so far, AB defined two groups deserving full protection, based on the relevant characteristics determining the personality. In its resolution 22/1997 (IV. 25.), AB considered belonging to national or ethnic minority, while in resolution 4/1993 (II. 12.), it regarded religious conviction as such.

for protection of its personal rights, while a minority – when its collective rights are violated – which faces threats of their annihilation every day, and which is organized on the basis of the "mere fact" that its members claim to belong to the group, is not entitled the same. All verbal and non-verbal manifestations analyzed in my book have threatening force,[617] and as such it diminishes the feeling of safety of the members of that community. Besides the direct threat, an additional threat and regrettable consequence of this is that it carries content that may trigger emotions in the entire society. Although it is impossible to fully specify the content of the protection the given community is entitled, it is obvious that attacks of the groups are dangerous, because they knowingly and deliberately attack the free choice of identity by the members of the given community.

The essence of hate speech and abuse is that it means any verbal or non-verbal manifestation against a community, which – enforced via the community – diminishes the human dignity of its members by questioning the common characteristic of the group members, which is the relevant characteristic of the individuals by belonging to the group. Since the connection between the community and its members is rather strong, the offence to the community is practically an offence to the individual.

The opinion of the legal science is divided about whether the legal provisions currently in effect are adequate in this case to ensure the proper legal protection, so I felt necessary to analyze the significant litigation proceedings related to the protection of the communities' dignity. The conclusion is that the currently effective legal environment cannot provide adequate protection, because neither the civil, nor the criminal judicial practice recognizes the group as a legitimate entity in the proceeding, which excludes the possibility of protecting the personality rights of the communities.

III.2. Attempts for Domestic Regulation (Historic Chapter)

In Part II of my book I analyze the history of the regulation in two chapters. First I give an overview of the period from the Act V/1878 on criminal actions and offences (Csemegi Code) to the transition, then a continue with the analysis of the period between 1989 and 2004, when the AB resolution 18/2004 (V. 25.) was issued. The two periods are markedly separated from each other. The descriptive analysis introduced in the first chapter is relevant from the aspect of my work, because – although during the first period the issue of human dignity of communities was not even mentioned, the fact that it existed was not debated neither by the legal literature nor by the legal practice – the standard material presented here is the frame of reference for the resolutions of the constitutional

617 Tilk Péter, A kifejezési szabadság és a gyűlöletbeszéd néhány alkotmányjogi vonatkozása, *Acta Humana*, 2005/1, 14.

court being analyzed. All resolutions refer to the definitions accepted by the Curia. The issue of the communities' human dignity, penalization of the brutal verbal attacks against societal groups – by amending the statement of provocation against community – has become current only after the resolution of the AB deeming unconstitutional certain provisions of the Act XXV/1989 on the amendment of the Criminal Code. Since the transition, AB made four resolutions about the legal state of provocation against community.[618] All regulatory attempts – just like the responses of AB – have direct impact on today's Hungarian legal development.

At the time of the first AB resolution – 30/1992 (V. 26.) – Hungary was just over the transition to the democratic order after the long decades of the state order ruled by the party. This "change of times" required that after the decades of censorship AB – giving preference to individual rights instead of protecting collective rights – made a resolution that with respect to any opinion, the "free debate" is desired.[619]. In this resolution AB laid down the principles, which have been applied as axiomatic truth of basic rights judicial practice ever since. AB, using the necessary-proportionate and the "clear and present danger" test taken over from the American legal development, "besides deciding the concrete case, also determined valid starting points for later cases",[620] and with its resolution it laid down the basics of the "liberal concept" of the right to freely express opinions […], the main characteristic of which is that if an idea has followers on the market of ideas, then this idea is entitled to enter the market."[621] Providing "guidelines" for the collision of basic rights, the resolution of AB highlights: the freedom of expressing opinions allows "active participation of the individual in the societal and political processes".[622] On the other hand, "a person who instigates, encourages and excites for hostile behavior and actions causing damage against certain person, group, organization or measure." Instigation not only disturbs public order, but threatens with the violation of the basic rights. This double – justified – threat intense and dangerous above a certain level, keeping in mind the ultima ratio principle of the criminal law makes the state of instigation constitutional. The AB resolution – drawing the limit of the freedom of expressing opinions at instigation – stated: although the dignity of communities may be a constitutional limit to the freedom of opinion, the state

618 See the analysis of AB resolution 30/1992 (V. 26.) in the study (Gyűlöletbeszéd és gyűlöletre uszítás) of András Szabó (*Kriminológiai Közlemények*, 60[2002], 63–68); a 12/1999 (V. 21.) See the detailed analysis of the AB resolution in the study of Zoltán Varga Gyűlöletbeszéd (*Kriminológiai Közlemények*, 60[2002], 69–77).

619 Molnár Péter, Pótcselekvés, *Fundamentum*, 2000/3, 84–88.

620 Koltay András, A köztársaság nevében, in Uő–Balla Judit–Borbély Zoltán (szerk.), *Pálinkás György emlékkönyv*, Budapest, Rejtjel, 2007, 104.

621 Legény Krisztián, Szólásszabadság és tolerancia, a gyűlöletbeszéd szabályozásának alternatívái, *Jogi Tanulmányok*, 2004. 115–133.

622 30/1992 (V. 26.) AB resolution, III. 2.1.

of instigation is unconstitutional, because it does not represent an external limit, but qualifies the opinion with regard to its value content, and protects public peace only in an abstract way by not assuming the violation of individual rights.

Probably the equivocal interpretation of the two tests developed in the resolution led to the decision BH 1997. 165.: In the case of Albert Szabó, the Supreme Court – accepting a legal interpretation adverse to the resolution – identified the threshold of culpability at incitation to act physically against the Jewish community, expecting that the given statement nearly turns into physical action. In its verdict, the Supreme Court – causing the lack of uniform application of the law in the practice of law enforcement – accepting the narrowing interpretation of provocation against community, practically "set a new standard when making a decision in the case".[623]

The central issue of the debate process following the resolution and the decision of the Supreme Court was that assuming as an objective to sanction not the instigation, but verbal abuses, whether the misuse of the free speech can be limited in order to protect the dignity of the communities, and if yes, how. In addition to the above, the factor explaining the legislative necessity of drawing the Act XVII/1996 serving as basis for the AB resolution 12/1999 (V. 21.) also on societal level was that during this period in Hungary violent actions against individuals belonging to a different nation, race or religion became more and more frequent. The standard did not sustain the test of constitutionality. Summarizing the opinion of AB: unconstitutionality of the phrase "other action capable of arising hatred" can be identified on the one hand in the exaggerated lowering of the threshold of culpability determined in instigation, and hence limiting the freedom of opinion, on the other hand – due to its uncertainty – it does not meet the requirement of the clarity of standard, so it is against the principles of the constitutional criminal law. With reference to the AB resolution 30/1992 (V. 26.), the body stated: "if the threat reaches the same level as instigation, then it is not necessary to separate the »other action«, because the state of instigation absorbs such behavior."[624]

AB resolution 12/1999 (V. 21.) continues with the liberal approach and the faith in the self-cleaning ability of the society formulated in AB resolution 30/1992 (V. 26.). And only a year later, when the resolution regarding the use of the symbols of tyranny was made: in the AB resolution 14/2000 (V. 12.) the faith in the self-regulating ability of the society failed, and the body – accepting the lower threshold of culpability – stated that activities based on the ideologies of past dictatorships must be exiled from publicity, with respect to the fact that "society is unable to face its past, the hurting and shameful experiences and

623 Koltay, *i. m.*, 107.

624 12/1999 (V. 21.) AB resolution, II.

condemn firmly enough […] statements offending various groups".[625] The lack of coherence between the different AB resolutions, the practice of the Supreme Court opposing each of them and the contradictory law enforcement made the legislation urgent. The case of Lóránt Hegedűs Jr. was a catalyst to the legislative process. After the publication of his baldly anti-Semite article, several social organizations called for a regulation that allows efficient actions against hate speech. In the conducted proceeding, the Regional Court of Budapest – opposing the dogmas determined by AB – practically made impossible the interpretation of the trio of hate speech – provocation – instigation, when stating that the ill-famed call "Shut them out!..." does not assume the intention of the defendant to encourage his readers to commit violent actions and requiring the ability of the statement to trigger violent actions, supplemented the standard to be applied with an additional element.

Following this, in 2003 the Parliament accepted the new statement of provocation against community, the bill T/5719, declared unconstitutional by AB. The AB resolution 18/2004 *(V. 25.)* stated that provocation and instigation are concepts identifying different behavioral forms. With respect to the conceptual delineation, AB and the Supreme Court has been representing the same opinion only since the AB resolution 18/2004 (V. 25.). The said AB resolution took over the narrowing interpretation, however it does not explain, how can a verdict be referred by an AB resolution, when it is adverse to the resolution, on which the legal interpretation of the body is based. The problem is that already the Act XVII/1996 tried to "reinstate" this narrowing interpretation not included in the AB resolution, while the bill T/5719 was another – I think better – attempt to the same. For this reason, the bill is not in conflict with the earlier AB resolution, but only with the narrowing standard interpretation of the Supreme Court.

When completing the assessment, AB used two premises: on the one hand, from the equivocal AB resolutions with respect to instigation (i.e. whether or not behavioral forms other than instigation can be sanctioned) it accepted the one, according to which instigation represents the level that cannot be lowered by the low-maker, while on the other hand – still assuming the societal self-cleaning ability as an axiom – it declared that also the current regulation – despite the changes of historical and societal circumstances – must meet th previous two AB resolutions.

My opinion is that we cannot speak of an actually free society and individuals treated as equals, as long as certain individuals – hiding behind a basic right and threatening others – "freeze communication". In such cases, the free society will surely have to face two consequences: it will become insensitive to the shutting out attitude, and extremism will normalize.

625 Molnár Péter, Pótcselekvés, id. kiad., 86.

The resolution stated that while provocation – according to the judicial practice – as a softer action affects the ratio, instigation on the other hand counts on the instincts and mobilizes, but does not explain, why an action affecting the instincts is less threatening, than the one affecting emotions. According to the opinion of the body, the invitation to commit a violent action remains below the culpability threshold measured with the necessary-proportionate approach, and as such, is unconstitutional.

III.3. International and European measures Taken Against Verbal Aggression

International treaties and European Union sources dealing with the subject of basic human rights all state that although the freedom of opinion has a distinguished position in the system of human rights, it is not an unlimited basic right. In part III of my book – analyzing the international and European systems of legal regulations and exploring the size of the Hungarian punitive legislative obligations and the lacks and contradictions of the effective standard and the practice of AB, I seek the answer for the question of what opportunities and tasks the law-maker has to perform in order to ensure that Hungary meets its international obligations. The tendency of development must not be stuck, where it started in 1989-1992. Both the international law and the nation-state legal order based thereon develops dynamically, in an increasingly tight cohesion with each other, also showing the way for our country in order to ensure that by the end of the stabilization and joining process Hungary belongs from all aspects to the European cultural nations.

Structural division of part III is explained by the fact that that the contracts and international organizations related to the subject matter were founded to ensure that by creating the broadest possible integration, each country could find a way of preventing from reoccurrence the horrible events taking place during World War II. The issue of protecting human rights against state intervention gained importance parallel to the issue of Europe's political and defence integration, for which complex objectives the United Nations was founded. Insurance and protection of the human rights became one of the central objectives of the UN,[626] which was manifested in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights. The international treaty also accepted under the aegis of the UN prior to the International Covenant on the elimination of all forms of racial discrimination (hereinafter referred to as the UN Treaty) determines in a more detailed way the contents of actions and legislative obligations against racial discrimination, concretely defining the scope of actions to e sanctioned. International documents explicitly identify the

626 See more details in Pieter N. Drost, The Crime of State: Penal Protection for Fundamental Freedoms of Persons and Peoples, in: *Humanicide*, Leyden, A.W. Sythoff, 1959, 37–43.

obligation to establish regulatory and criminal sanctions, which exists in case of both violent actions and actions directly threatening with violence. Legal practice and general recommendations of CERD (Committee on the Elimination of Racial Discrimination), the monitoring organization related to the UN Treaty reflect a similar approach. We must mention among the international efforts against extreme manifestations the model act of the UN against racial discrimination, which serves only a guide to the member countries, without creating international legal obligation.

The original objective of the European integration using the motto "in varietate concordia" was more concrete, than that of the UN. World War II was followed by the period of the cold war. For the sake of cooperation and peaceful settlement of conflicts, in 1949 the Western European Nations founded the Council of Europe, the main objectives of which included the fight against racism, xenophobia, anti-Semitism and intolerance. One of the most important documents of the Council is the Convention for the Human Rights and Fundamental Freedoms accepted in 1950 in Rome, which – similarly to the International Covenant – determines the right to express opinion, but does not determine specific legislative obligation with respect to the prohibition of preaching hatred. However, from the legal practice of the European Court of Human Rights and the European Commission of Human Rights – the essence of which is that the liberty of express opinion does not apply to opinions that are in conflict with the spirit of the Treaty of Rome, or is incompatible with democracy and human rights – it can clearly be derived that actions against hate speech serves a legitimate purpose within the frames of the Treaty, ad does not violate the freedom of opinion. Perhaps the most significant documents of the Council of Europe are the general political recommendations 7 and 9 formulated by the European Commission Against Racism and Intolerance (hereinafter referred to as ECRI), and the reports completed on the participating countries, which – while emphasizing the distinguished importance of the penal means – call for the establishment of a complex system of protection to the national law-maker.

For the sake of reconstructing Europe and to resolve the French-German conflict, with the need of a tighter integration, the six founders established the first Union in 1951 mainly for economic considerations. Originally, none of the founding documents of the European Communities contained provisions regarding the protection of human rights, so the establishment of the system for protecting human rights was started in the legal practice of the Court of European Communities. A number of measures were taken also within the European Union for the sake of fighting against racism and xenophobia, however the actions against discrimination have been given specific emphasis since the 1990's. Article 13 of the Contract on the European Communities (hereinafter referred to as EKSz) introduced with the Amsterdam Treaty and providing general

authority to the European Communities against any discrimination provided much broader opportunity to act. This reflects both political commitment to ensure equality and reinforces the authority of the Communities to act against discrimination.[627] The Amsterdam Treaty reinforced the opportunities of the Union also in terms of the third-pillar cooperation. Article 29 of the Contract on the European Union (hereinafter referred to as EUSz) formulates the prevention of and fighting against racism and xenophobia as an explicit objective. The Charter of Fundamental Rights of the European Union – emphasizing the community level protection system of human rights and expressing the uniform system of values of the member states – specifies provisions on the freedom of opinion and its limits, the prohibition of discrimination and the prohibition of misusing the right similar to the provisions of the Rome Treaty[628].

Besides the primary one, the secondary community legal material also contains provisions similar to the above ones. In my book I give a detailed analysis of the two anti-discrimination principles accepted on the basis of Article 13 of the EKSz. With respect to the fact that the third-pillar legal harmonization is explicitly about approaching penal legal provisions, it should be noted that the 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 – with regard to Paragraph 29 of EUSz 29 – (hereinafter referred to as Framework Decision), which – while respecting the different cultural and legal traditions of the member states – besides emphasizing the criminal prosecution reflecting a uniform approach it states that its effect is restricted to combating more severe forms of racism and xenophobia.[629] The Framework Decision does not have any direct effect, it does not automatically become part of the member states' national legal systems, but it is mandatory from the aspect of the goals to be achieved, and as such, the law-makers of the member states have to adapt it to their national law.

Comprehensive analysis of the international and community regulatory system is important on the one hand because of the commitments of and requirements against Hungary mentioned earlier; on the other hand it is important to see how the member states of the European Union and other countries combat verbal and non-verbal aggression against the dignity of their communities. In the course of the democratic transition in Hungary, the law-maker relied on the regulatory environment of "elder" democracies to create its own standards, while keeping in mind its own national characteristics. AB did the same, when

627 Takis Tridimas, *The General Principles of EU Law*, Oxford, Oxford UP, 2006, 64–65.

628 John Fairhurst–Christopher Vincenzi, *Law of the European Community*, Harlow, Essex, Pearson Longman, [4]2003, 42.

629 Steve Peers, Büntetőjog (excerpt), in Lévay Miklós–Kígyóssy Katinka (szerk.), *Bűnügyi tudományi közlemények. Az Európai Unió hatása a büntetőjog fejlődésére*, Miskolc, Bíbor, 2004, 209.

choosing the assessment criteria of the American type liberal regulation to establish its own fundamental rights test. For this very reason I consider the analysis of the nation-state regulations very important. Without the demand of detailed historic retrospect I analyze the legal environment of several countries to confirm that states the example of which Hungary follows have been able to meet their European and international obligations.

I conclude the international section of my book with the analysis of the tasks Hungary is to perform. We must see that the Hungarian opinions related to the topic are markedly separated, depending on the fact that some consider the available legal means adequate against the expressions offending the human dignity of communities, while others – myself included – are of the opinion that law-making is necessary, because even if courts apply the state of instigation correctly and in line with the original intentions of the law-maker, it would not be sufficient to efficiently protect the human dignity of communities in accordance with the expectations of the international and European law. Quoting constitutional lawyer Péter Kovács: Provocation against the community "sanctions only instigation for hatred, but this way, the obligation deriving from the UN treaty […] is only partly fulfilled."[630] László Valki uses even more critical words: "AB was negligent to the international obligations assumed by the Hungarian State." With reference to Article 4 of the UN Treaty, he writes the following: "It does not even mention the possibility of restricting interpretation, i.e. the state – as an exception and in justified cases – could allow the spread of racist ideology and provocation for hatred against minorities in its territory."[631] The explicit requirement of law-making can be read from the international documents. The fact that the Hungarian legal system does not meet this requirement is clearly evidenced by the reports of these organizations repeatedly condemning Hungary. Despite this fact, no progress has been made, because the latest legislative attempts to sanction hate speech with the means of criminal law have not passed the test of constitutionality, either.

In case, if the harmony of our assumed international legal obligations and of the internal law is not ensured, the law-maker can choose from two options. One option is the Hungary tries to be released from its international obligations: it terminates the international contract, or if it is possible, initiates its amendment. Nobody can, however, seriously think, that for our country modifications of international agreements in complete conflict with the fundamental values of democracy, termination of these agreements or leaving the international organizations, turning against the entire world and cease to be a cultural nation

630 95/2008 (VII. 3.) AB resolution – parallel explanation of Péter Kovács, member of AB, III.

631 Valki László, Szólásszabadság, alkotmány, nemzetközi jog, *Népszabadság*, 2009. augusztus 14; A magyar állam a nemzetközi jogsértés állapotába került, www.nepszava.hu/default.asp?cCenter=OnlineCikk.asp&ArticleID=1182728. – Downloading time: 24 /Aug./2009.

can be realistic alternatives. The other – actually the only realistic and correct – solution can be that the law-maker finally fulfills the obligation stipulated in Article (1), Paragraph 7 of the Constitution, and guarantees the harmony of the summed international obligations and of the internal law by making the necessary legal provisions, and – if otherwise impossible –, eventually by the amendment of the Constitution.[632]

III.4. Other Cases of Protecting the Dignity of the Community

With its resolutions, the Constitutional Court incited the law-maker to examine, if it is possible to protect the dignity of the communities within the frames of other legal divisions or by protecting other legal objects. In part IV of my book I complete this analysis. First I will examine two actions which – regarding their subject – cannot be separated from the actions committed against communities and offending the human dignity of the group members, such as the denial of holocaust and the use of symbols of tyranny. My goal is to prove that the law-maker – if he wants to meet the international and European Union expectations and wants to perform his tasks deriving from the societal need for safety – must use a complex approach to analyze the issue of expressions offending the dignity of the communities. Since in case of all forms of offending the dignity of the communities – denial of the holocaust, use of the symbols of tyranny and verbal aggression – the protected legal object is not the "abstractly jeopardized public order", but the fundamental constitutional right to live and to human dignity, I will only analyze these three actions.

Denial of the holocaust cannot be separated from instigation, for it is one of its form of expression. In my book I will prove that the international and European law requires uniform actions against the denial of the holocaust. Member states of the European Union handle the denial of the holocaust as a specific aspect of hate speech, but at least parallel with it, practically built on ach other the denial, diminishing or supporting of the holocaust, other genocide or crimes committed against humanity. In 2009 the investigation of the possibilities to act against the said behavior started in Hungary as well. At this point I will address in detail certain issues representing the cornerstones of the regulatory concept, and I will analyze the bill T/9861 aiming at such modification of the Criminal Code. According to my opinion, the recommendation – although it should be welcomed in terms of its goals – from content and wording aspects is not adequate for the efficient management of the problem. In case of denying the holocaust, the legal object to be protected is human dignity. Consequently, in the chapter of criminal actions against freedom and human dignity, the denial of the holocaust must be listed after defamation, slander and verbal aggression.

632 Vö. Petrétei József, *Alkotmányjog*, I, Budapest–Pécs, Dialóg Campus, 2002, 171–175.

Within the scope of similarities between the denial of the holocaust and verbal aggression – if we assume that denial of the holocaust, similarly to the instigation classified unconstitutional by the AB resolution 95/2008 (VII. 3.) limits the freedom of opinion with respect to its value with the less concrete danger of violating the fundamental constitutional rights – it must be analyzed from constitutional point of view, whether the denial of the holocaust limits the freedom of opinion even more. We have reason to conclude that AB would judge this issue according to its consequent practice regarding hate speech followed since 1992. And if so, the opinion of the body can be predicted.

In case of the use of symbols of tyranny, my goal is to prove by exploring the conflicts between international legal practice, the international regulation and the AB resolution, that the currently effective regulation is not adequate, and its amendment is necessary among others because of the verdict of the European Court of Human Rights made in the case of Attila Vajnai, and because of the incoherent practice of the constitutional court. Currently the forbidden behaviors included in the Criminal Code also extend to activities, which are protected under Article 10 of the Rome Treaty, so the prohibition of using the symbols of tyranny should not apply to cases, when the mere fact of use does not express identification with the absolutistic regimes represented by the symbols, and the person carrying the symbols does not intend to offend or threaten the dignity of others. Many people are undoubtedly offended by the mere sight of the historic symbols of totalitarian systems. Nevertheless, I tend to support the opinion that merely displaying these symbols does not represent such level of social threat that declaring these behavioral forms criminal actions would be necessary and justified. The basic problem is not with the symbols themselves, but the way they are used. In accordance with the international trend and the Strasbourg decision, instead of the usage objectives taken from the application of the sanction deliberately making the action a crime and handling as part of the hopeful legal status of instigation. That is nothing else, but "hate speech" committed with symbols. This would more in line with the requirement formulated in the AB resolutions related to the freedom of opinion.

Following the tasks assumed by AB, after this I will analyze the civil law response given to the issue of offending the dignity of communities. In this scope I rely on the fact that in its "provocation"-related decisions, AB practically invited the law-maker to consider the possibility of amendment by keeping in mind that "the dignity of communities can also be protected efficiently […] by other legal means as well, for example by extending the application of non-material indemnification".[633] The question is how. Since it is the obligation of the state to ensure protection to its citizens, can a regulation be considered constitutional,

633 30/1992 (V. 26.) AB resolution.

when the objects of the hate speech do not have the opportunity of enforcing their claims, merely because based on the verbal aggression, they cannot be personally identified? The objective of the bill T/3719 was to ensure that reparation is possible not only in case of protecting personal rights of an individual, but also in case of expressions offending a group of individuals characterized by a common feature. AB resolution 96/2008 (VII. 3.) declared the bill unconstitutional. On the other hand, the resolution and the attached parallel explanations clearly indicate that the law-maker is on the right path. The bill T/6219 – according to the provisions of the AB resolutions – placed the regulation of the topic on new a new basis. The bill – along the aspects and constitutional criteria determined by AB, taking into consideration certain objections of the President of the Republic – to remedy the deficiencies of the effective standard from procedural and material law point of view and to create a complex set of means to combat against hate speech. The President sent the bill to AB expressing his constitutional concerns. At the time of writing my book and/or formulating my theses AB has not yet made a decision. According to my opinion – with respect to the fact that each premise in the President's proposal can be confuted – a favorable decision of the body can be forecasted. In connection with the assessment of the bill, we can refer to a simply principle: the more contains the less. If AB – considering the ultima ratio nature typical for the Criminal Code – is of the opinion that punitive statement can only be formulated, if nothing else works, then this obviously includes both civil material and procedural legislation as well. The law-maker met exactly this requirement of the constitutional court, accepting the guidelines laid down in AB resolution 96/2008 (VII. 3.), when established the adequate civil law regulation to protect the dignity of the communities.

III.5. New Directions of Protecting the Dignity of Communities

In part V of my book I explore the newest direction of legal development. Miklós Lévay writes in his parallel opinion: "…the trends of public talk, public status, publicity and the level of tolerance did not follow the approach determined in AB resolutions Abh1., Abh2. and Abh3".[634] My opinion is the same. I think that with the bill T/2785, the law-maker – admitting that the problem cannot be handled by modifying the statement of provocation against communities – established a constitutional regulation of European level. The objective of the regulation was to ensure that anyone, who uses the dangerous weapon of word" cannot misuse exercising his or her fundamental constitutional rights.

The bill followed the approach dominating in the AB resolutions: instigation is not a milder form of provocation against a community. Earlier attempts of the law-maker were unconstitutional, because they tried to resolve the problem

634 95/2008 (VII. 3.) AB resolution – parallel explanation of Miklós Lévay, member of AB, I/3.

by modifying the legal definition of provocation against a community. While provocation against a community threatening public peace is included in Article II, Chapter XIV of the Criminal Code, instigation is addressed in Article III, Chapter XII of the Criminal Code. Instigations are not simply extreme views disturbing public peace, but extreme expressions humiliating religious groups, races and nationalities. The objective of the law-maker was not to prevent that extreme views are expressed, but to ensure that if individuals cannot be offended through verbal or nonverbal aggression, then the same could not be done with certain groups of the society, either. The intention of the bill was to insert a new section to the Criminal Code, the legal subject of which was the human dignity and the social interest related to the protection of honor originating from dignity, while the second objective was to ensure the fundamental right to prohibit discrimination, as well as the social interest related to the principle of freedom of conscience and religion, national and ethnic rights. The action determined in Article (1) penalized "classic method" of instigation as a formal criminal action, when the person committing the action uses or spreads terms that may diminish honor and dignity. In Article (2) the bill was to sanction instigation implemented with body movement. The term *body movement* is unambiguous, and can well be handled in both public and professional languages: it does not provide room for discretionary interpretation by the judge. My opinion is that including this term in the standard text meets the requirement of standard clarity set by AB against the legal provisions. Furthermore, it is sufficiently abstract and does not unnecessarily narrow the scope of such actions and to leave room for consideration to the judge. In order to ensure that the legal statement of instigation does not become the means of suppressing political extremists, a clause excluding the culpability of criticism against certain political parties or groups was added in Article (3) of the bill.

The President of the Republic expressed his constitutional concerns in connection with the accepted bill, as a consequence of which AB resolution 95/2008 (VII. 3.) declared it unconstitutional. For the first time, the legal statement of instigation ordered to be sanctioned via protecting the different legal object divided the members of AB, thus encouraging the law-maker to fulfill its tasks itemized by the expectations of the society, if necessary, via additional attempts. On the other hand, however, the explanation of the majority opinion of the AB resolution does not significantly differ from the one issued in 2004.

According to my opinion, although the task of AB is to exercise control over the legislative process, the tendency, according to which the institution itself sworn to protect fundamental rights prevents with its passivity the functioning of the legislative process desiring to provide protection to the offended dignity of social groups. During the last fifteen years, after five unsuccessful attempts to protect the dignity of communities it must have become obvious that penalization of instigation is the firm intention of the legislative process. It is not the obligation

of AB to give advice to the law-maker, still it has applied this desirable practice from time to time, when in the preamble of the resolution it suggested the correct and constitutional solution. Well, in this case the same would not be vain.

In my book I analyze the suggestion o the President of the Republic, as well as the contents of the AB resolution. I summarize my findings derived from the comparative analysis with the previous basic resolutions following the order of the findings of the resolution, providing itemized evidence, that according to my opinion, the set objective van be achieved.

The significance of analyzing parallel and minority opinions is higher than that of the majority opinion, because this ways the first time that in connection wit the hate speech, the Constitutional Court did not make a unequivocal resolution. Members of AB formulating different opinions represented the opinion the body should review its opinion regarding the freedom of opinion. This undoubtedly shows improvement from the resolution made in 2004, after which many thought that the decision made impossible any action against hate speech once and for all. László Kiss emphasizes the following: in its resolution regarding the symbols of tyranny, AB clearly assumed "historic determination". Péter Kovács emphasizes that based on the legal practice of the European Court of Human Rights the freedom of opinion "…does not apply to expressions and ideologies negating the values expressed in the Convention for the Human Rights and Fundamental Freedoms."[635] He emphasizes that the approach followed b AB up to this date – i.e. the possibility and fact of expressing opinion is protected regardless to its content – has become obsolete in the European Union. László Kiss also refers to this circumstance, when stating that the precedential right of AB continues to draw away from the international tendencies.[636]

Let's be clear: as a democrat, I accept the decision of AB, but I cannot agree with it. I am convinced that based on the effective Constitution this could be one of the possible ways of regulation.

III.6. Current Issues of Protecting the Dignity of Communities

The starting point of my work is that together with the changes of the societal processes and with the new expectation of the society, the legal provisions, even the Constitution itself have to change as well. More than fifteen years have passed since AB identified the limits of free speech. For minor changes of the society and for shorter periods such changes do not necessarily require modifications of the legal provisions, it is sufficient to slightly adapt the legal practice – in this case the interpretation of the Constitution, naturally in line with the text of the Constitution. The expectation of the citizens is clear: to find a way to protect groups of the

635 236/A/2008. AB resolution – parallel explanation of Péter Kovács, memer of AB, II.
636 Uo.

society suffering brutal verbal and nonverbal attacks every day. In case, if the effective Constitution itself – by any interpretation thereof – prevents this goal, leading to the risk of odium that Hungary will commit omissions in terms of international law, the possibilities of amending the Constitution has to be investigated.

Part V of my book seeks the answer to the question, i.e. how this legal protection can be ensured, while managing the actions implementing group-level offence to human dignity, distinguishing them from statements offending or jeopardizing public order. From the preamble of the AB resolution 95/2008 (VII. 3.) declaring unconstitutional the bill T/2785, as well as from the parallel and minority opinions attached thereto it has become obvious that as long as the majority opinion of the body with respect to free expression of opinion remains unchanged, it is not possible to create a punitive legal provision with respect any of the verbal expressions offending the human dignity of communities, but not reaching the level of instigation without the amendment of the Constitution. The government and the fraction of the governing party of the Parliament maintained its political and professional opinion, i.e. the establishment of punitive sanctions is necessary from social point of view, while from legal point of view it is the obligation of our country; for this reason, the bill T/9045 on the amendment of the Constitution was submitted to the Speaker of the Parliament. Almost parallel to the withdrawal of this recommendation by the government, ninety six representatives – myself included – submitted to the Speaker of the Parliament a partly extended and more concrete version of virtually the same recommendation.

The bill T/9584 supplemented the provision related to the freedom of opinion with a clause specifically related to the denial of holocaust and related behaviors, and furthermore it contained a concrete provision related to the right to assemble and the right to associate. The objective of the two submitted bills was to integrate the expectations formulated in the international and community documents into the provisions of the Constitution. A few days prior to the closing voting of the bill, an additional suggestion to amend the Constitution was submitted under the number T/10082. The bill, however, – inclusion of which to the agenda has not yet been decided – does not contain provisions related to the establishment of the constitutional environment necessary to ensure culpability of instigation, only with respect to the negating the crimes of national-socialist and communist regimes, and would determine a new limit only for the freedom of opinion. It is a question, however, if there is an actual legislative intention behind the bill, because the circumstances of its submission allow to conclude that the only reason for submitting the bill was to find an excuse to explain voting down the previous suggestion. Nevertheless it cannot be excluded that the submitting parties wish to forward their bill until the final voting, which makes the question actual again: can we support a suggestion that offers a partial solution carrying the risk of misuse and the serious threat of counter-productivity?

IV. Summary of the New Scientific Results

In my book – relying on theoretical and practical experiences - I have supported the premise that in line with the international and community law it is Hungary's obligation to provide better protection for the human dignity of communities. I attested that the efficient protection of rights must not be restricted to the modification of the means of the civil law and other divisions, but we are obliged to establish a criminal law statement penalizing offences to the human dignity of communities in a scope extending beyond instigation, and the sanction assigned thereto must not be insignificant. Hate speech and denial of the holocaust must be regulated on the level of criminal actions. It is also possible of course to terminate our membership status in the European Union and terminate international contracts stipulating legislative obligations, but I think seriously considering this option would be absurd.

In the course of my work I demonstrated that instigation and denial of the holocaust can be declared crimes even within the frames of the currently effective Constitution. The only obstacle to do so is the legal interpretation of AB, which I consider to be unsustainable. We can fulfill our international obligations without the amendment of the Constitution only in case, if the Constitutional Court revises its practice related to the freedom of opinion.

We have reason to conclude that with the current legal practice of AB, a bill declaring the denial of holocaust a crime – without the amendment of the Constitution – would be declared unconstitutional by AB. In my book I demonstrated why we should handle the denial of the holocaust as a special expression of instigation. My research has shown that – as a consequence of the identity of the protected legal object – it worth declaring the denial of the holocaust a crime only together with instigation. With respect to both actions, changing the related paradigms of AB is necessary, i.e. claims can only be enforced in case if an individual person id offended, with respect to the fact that the individual does not possess procedural legitimacy, if the individual is offended as a member of a group or community. A pre-requisite of this that the AB accepts the parallel opinion of László Kiss, member of AB attached to the AB resolution 95/2008 (VII. 3.), i.e. that the concept of the dignity of community must be defined.

In addition to the scientific analysis, I also supported in case of concrete legal cases that the indictable offence of violating symbols of tyranny cannot be applied properly, it is a contradictory legal statement and should be transformed into a deliberate criminal action and be regulated as a form of instigation, in the same legal statement. By doing so, the conflict between the legal interpretation

by AB and the legal practice of the European Court of Human Rights and the instigation and related resolutions can be resolved.

In the course of my extended analytical and practical work I have come to the conclusion that provocation against a community – with respect to the difference of the primary legal object – should be handled separately from instigation. While the function of the former is to protect public order, the latter is responsible for protecting human dignity. In this case, in terms of provocation against the community, both the narrowing interpretation applied by the Supreme Court and the "clear and present danger" approach devised by AB can be further applied. In case of declaring instigation a criminal action – since in this case a different legal statement would take care of the communities' human dignity, and the exclusive legal object of this criminal action remains the societal interest related to the protection of the public order – transformation of the provocation against the community into threatening should be considered, mainly as the Regional Court of Budapest did so illegally.

In addition to declaring instigation a criminal action, in order to create a complex regulatory system, it is also necessary to protect the dignity of communities also using the means of the civil law.

In case if the opinion of AB remains unchanged, the law-maker should not make any vain attempts to penalize instigation before the Constitution is amended.

V. Areas of Utilizing the Results of the Book

The subject chosen for this book is dedicated increasing emphasis in the domestic and international literature and my opinion is that this trend will continue in the near future. The forecasted direction of development formulated also in the international documents shows a way toward the establishment and operation of an efficient penalty system against offensive expressions against communities and their members.

Since I have provided a complex analysis of the subject in my book, it can be efficiently used in *tertiary education* in both gradual and post-gradual education.

A new element in this field of research is that my book provides a complex analysis of combating against verbal and nonverbal aggression and in addition to exploring the Hungarian regulation from the political transition up to this day, it includes a comprehensive international outlook as well. As a result, the reader can have an insight not only into the system of legal sources not only of the European Union, but also those of other international organizations, as well as into the judicial practice. This way, the book can also be used by the broadly interpreted *practical law enforcement*.

I provided a detailed analysis of the difficulties for the criminal and civil law enforcement related to decision-making in case of actions offending the human dignity of communities, in turns of the contentious legitimacy on the one hand and with respect to the legal statement of the actions on the other hand. Partly due to its dogmatic clarity and partly by conflicting the arising contradictions, it clarifies from the comparative analysis by deducting the right conclusion, and is adequate to provide help in establishing and maintaining a *uniform judicial practice*.

In the course of analyzing the resources I formulated my opinion among others by studying the publications of highly respected specialists expressing their opinion related to the details of the subject. Analysis of the opinion of some exemplary jurists helped my practical work performed in legislation. Since such comprehensive analysis of the subject is currently not available, I think that this book, as a *source* can be utilized – besides the practice – also in *theoretical work* and *legal sciences*, and may even serve as basis for further research.

May general experience is that individual recommendations aimed at standardization – as responses to actual societal needs – and sometimes even the accepted standard lacks the theoretical ground, which would be necessary to ensure that the given legal provision comes to effect in line with the goal to be achieved. My book can be used in the future *legislation* in order to ensure that future bills submitted in the topic can rely on the necessary theoretical grounds. As a result, the legislative redundancy manifested in the renegotiation of certain issues can be avoided.