60/6/A/2011

JUDGMENT

of 19 July 2011

Ref. No. K 11/10*

In the Name of the Republic of Poland

The Constitutional Tribunal, in a bench composed of:

Stanisław Biernat – Presiding Judge

Zbigniew Cieślak

Wojciech Hermeliński

Teresa Liszcz

Andrzej Rzepliński – Judge Rapporteur,

Grażyna Szałygo – Recording Clerk,

having considered, at the hearing on 19 July 2011, in the presence of the applicants, the Sejm and the Public Prosecutor-General, an application by a group of Sejm Deputies to determine the conformity of:

> Article 1(28) of the Act of 5 November 2009 amending the Penal Code, the Code of Criminal Procedure, the Executive Penal Code, the Penal Fiscal Code and certain other acts (Journal of Laws - Dz. U. No. 206, item 1589) to Article 54(1) in conjunction with Article 2, Article 31(3), Article 42 of the Constitution as well as to Article 9, Article 10 in conjunction with Article 17 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Dz. U. of 1993 No. 61, item 284) and Article 19 of the International Covenant on Civil and Political Rights (Journal of Laws - Dz. U. of 1977 No. 38, item 167),

* The operative part of the judgment was published on 3 August 2011 in the Journal of Laws - Dz. U. No. 160, item 964.

adjudicates as follows:

1. Article 256(2) of the Act of 6 June 1997 – the Penal Code (Journal of Laws –Dz. U. No. 88, item 553, as amended), in the part containing the wording: "or being carriers of fascist, communist or other totalitarian symbols", is inconsistent with Article 42(1) in conjunction with Article 54(1) and Article 2 of the Constitution of the Republic of Poland.

2. Article 256(2) of the Act indicated in point 1 above, insofar as it provides for the criminalisation of producing, recording or importing, purchasing, storing, possessing, presenting, transporting or sending – for the purpose of dissemination – printed materials, recordings or other objects comprising the content specified in Article 256(1) of the Act indicated in point 1, is consistent with Article 42(1) in conjunction with Article 54(1) and Article 2 of Constitution.

3. Article 256(3) of the Act indicated in point 1 above is consistent with Article 42(1) in conjunction with Article 54(1) and Article 2 of Constitution as well as with Article 54(1) in conjunction with Article 31(3) of the Constitution.

Moreover, the Tribunal decides as follows:

pursuant to Article 39(1)(1) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, of 2000 No. 48, item 552 and No. 53, item 638, of 2001 No. 98, item 1070, of 2005 No. 169, item 1417 and of 2009 No. 56, item 459**), to discontinue the proceedings as to the remainder.**

STATEMENT OF REASONS

[...]

III

The Constitutional Tribunal has considered as follows:

1. The subject and scope of the application.

The application lodged with the Tribunal concerns Article 1(28) of the Act of 5 November 2009 amending the Penal Code, the Code of Criminal Procedure, the Executive Penal Code, the Penal Fiscal Code and certain other acts (Journal of Laws - Dz. U. No. 206, item 1589, as amended; hereinafter: the amending Act). On the basis of that provision, Article 256 of the Act of 6 June 1997 – the Penal Code (Journal of Laws –Dz. U. No. 88, item 553, as amended; hereinafter: the Penal Code) was amended in the way that its previous content was marked as § 1 and §§ 2-4 were inserted with the following wording:
"§ 2. Whoever produces, records or imports, purchases, stores, possesses, present, transport or send - for the purpose of dissemination - printed materials, recordings or other objects comprising the content specified in § 1 or being carriers of fascist, communist or other totalitarian symbols, shall be subject to the same penalty.
§ 3. The perpetrator of the act prohibited under § 2 shall not commit an offence, if the said act was committed as part of artistic, educational, collecting or academic activity.
§ 4. In the event of conviction for the offence indicated in § 2, the court shall order forfeiture of the objects referred to in § 2, even if they do not constitute the property of the perpetrator".

The applicants have challenged the constitutionality of the extension of the scope of criminal liability – as juxtaposed with the content of Article 256 of the Penal Code before the amendments- for the acts which did not previously constitute an offence. They have also indicated that the circumstances eliminating unlawfulness (Article 256(3) of the Penal Code) have been regulated inappropriately. The applicants have requested the Tribunal to determine that Article 1(28) of the amending Act is inconsistent with Article 54(1) in conjunction with Article 2, Article 31(3), Article 42 of the Constitution as well as with Article 9, Article 10 in conjunction with Article 17 of the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950, as amended by its Protocols No. 3, 5 and 8 as well as supplemented by its Protocol No. 2 (Journal of Laws - Dz. U. of 1993 No. 61, item 284, as amended; hereinafter: the Convention) and Article 19 of the International Covenant on Civil and Political Rights (Journal of Laws - Dz. U. of 1977, No. 38, item 167; hereinafter: the ICCPR). In the view of the applicants, the challenged regulation constitutes a disproportionate restriction of the freedom of expression. Moreover, it violates the principle of specificity of criminal provisions and the principle of appropriate legislation.

In the judgment of 13 March 2007 (Ref. No. K 8/07, OTK ZU No. 3/A/2007, item 26, point III 2.1.), the Tribunal adjudicated that if the applicant did not challenge the

procedure for enacting the amending provisions (norms) or the manner of implementing them, then the Tribunal would review the constitutionality of provisions (norms) which had been amended as a result of enacting the amending provisions. In the substantiation for the application in the present case, the applicants have not raised such reservations. By contrast, they have challenged the conformity of the introduced regulation to the Constitution. Bearing this in mind, the Tribunal states that the subject of the allegation is Article 256(2) and (3) of the Penal Code (as regards Article 256(4) of the Penal Code, see the next paragraph), and not the amending provision – Article 1(28) of the amending Act.

Another issue that needs to be considered by the Tribunal is the scope within which Article 256(2) and (3) of the Penal Code has been challenged. The Public Prosecutor-General has assumed that Article 256(2) of the Penal Code has not been challenged in the part "or being carriers of fascist, communist or other totalitarian symbols", whereas the substantiation of the application indicates that the allegations of the applicants with regard to Article 256(3) of the Penal Code concern the wording which was drafted and not the one which is actually legally binding. As a result, the currently binding version of Article 256(3) of the Penal Code has not been included in the scope of the allegation. The Tribunal does not share the view of the Public Prosecutor-General. Indeed, the content of the application suggests that the applicants intended entire Article 256(2) and Article 256(3) of the Penal Code to be the subject of allegation. This is confirmed by the fact that entire Article 1(28) of the amending Act has been challenged in the *petitum* of the application, by the indication of the content of currently binding Article 256(2) of the Penal Code as challenged – on page 2 of the application as well as by the applicants' arguments presented at the hearing. As regards Article 256(3) of the Penal Code, in the light of the above, it is impossible to state that the applicants challenged the draft, and not the legally binding, version of Article 256(3) of the Penal Code. In the opinion of the Tribunal, a different conclusion may not be drawn by relying on the opinion of the Public Prosecutor-General, cited by the applicants on page 10 of their application; the said opinion was formulated at the stage of legislative work with regard to the draft version, and not the finally adopted version, of Article 256(3) of the Penal Code.

The Tribunal shares the view of the Public Prosecutor-General and the Marshal of the Sejm that the applicants have not referred to Article 256(4) of the Penal Code in the substantiation of the application, which makes it impossible to review it as to its constitutionality. However, issuing a ruling as to the conformity of Article 256(2) and (3)

of the Penal Code to the Constitution will determine whether Article 256(4) will be legally binding or not, due to its relation to Article 256(2) of the Penal Code.

This way the subject of review conducted by the Tribunal is Article 256(2) and (3) of the Penal Code in the version which is currently legally binding.

2. The amendments to Article 256 of the Penal Code – the extension of the scope of criminal liability**.**

Until the day of entry into force of Article 1(28) of the amending Act, challenged in the application, the following was subject to criminal liability under Article 256 of the Penal Code: public promoting of a fascist or other totalitarian system of government or inciting hatred based on national, ethnic, race or religious differences or for reason of lack of any religious denomination. It was prohibited to promote a totalitarian system of government and incite hatred by referring to the above differences.

The entry into force of Article 1(28) of the amending Act extended the scope of criminal liability by two types of conduct specified in § 2 added to Article 256 of the Penal Code. First of all, it includes producing, recording or importing, purchasing, storing, possessing, presenting, transporting or sending – for the purpose of dissemination – printed materials, recordings or other objects comprising the content specified in § 1, and secondly it includes producing, recording or importing, purchasing, storing, possessing, presenting, transporting or sending – for the purpose of dissemination – printed materials, recordings or other objects being carriers of fascist, communist or other totalitarian symbols. The offences under Article 256(2) of the Penal Code may be committed with direct intent i.e. for the purpose of dissemination.

In the draft amendments to Article 256 of the Penal Code of 5 September 2008 (the Sejm Paper No. 1288/6th term of the Sejm), the authors of the amendments indicated - in one-sentence comment – that it was necessary to extend the scope of criminalisation to include acts which were not committed publicly, and hence they were not subject to Article 256 of the Penal Code, which was legally binding at that time. The authors assumed that the aim of the amendments was to criminalise the production and sale (also via the Internet) which were not public in character, as regards objects comprising the contents promoting a totalitarian system of government or were carriers of fascist, communist or other totalitarian symbols. In the view of the authors, adding § 2 to Article 256 of the Penal Code would result in a situation that: “it will be prohibited not only to produce and sell, but also to possess and present printed materials, recordings (including films) or other objects

comprising the contents specified in § 1 if those activities are undertaken for the purpose of dissemination of those contents". In their opinion, the introduction of such amendments addressed the expectations of Polish society which still had painful memories of the war and the crimes of the fascist and communist regimes".

The legal opinions submitted during the legislative process were critical about the draft amendments to Article 256 of the Penal Code. On 5 November 2008, the National Council of the Judiciary of Poland issued a negative opinion on the Bill, arguing that "there were no grounds for interference with the subject-matter of the Code". In the opinion of 14 November 2008, the Minister of Justice – Public Prosecutor-General noted *inter alia* that, as a result of the enactment of the amendments, the scope of criminalisation provided for in Article 256(2) of the Penal Code and Article 256(1) of the Penal Code might overlap. The Main Council of Lawyers stressed, in its opinion of 26 November 2008, that the amendments did not indicate the intent with the motive – the purpose of the action of the perpetrator. Therefore, in the opinion of the Main Council of Lawyers, "some of the characteristics of the proposed legislation overlap with the characteristics of Article 256(1)". Moreover, "some of the characteristics (of e.g. possession) are formulated too generally, which would result in the undesirable extension of the scope of criminalisation". In a letter of 21 April 2009, the Council of Ministers indicated a discrepancy between Article 256 of the Penal Code in the version unchanged by the authors of the amendments (presently Article 256(1) of the Penal Code) and the draft version of § 2 added to Article 256, which included actions which were not preliminary actions for those set out in Article 256 of the Penal Code, but which specified a different type of offence. Consequently, in the view of the Council of Ministers, there may be partial overlapping of the scope of criminalisation, since dissemination or presentation may constitute a form of public promoting or inciting. Neither did other forms of activity (possession, importing and purchase) constitute preliminary actions with regard to the actions currently described in Article 256(1) of the Penal Code, as they may be a form preceding propagation that is not public in character, and which is not criminalised in Article 256(1) of the Penal Code. In the opinion of the Council of Ministers, they may also serve purposes other than inciting, but may not fall within the scope of the circumstances eliminating unlawfulness (e.g. in order to sneer or ridicule). The Council of Ministers indicated that the construct of the circumstances eliminating unlawfulness was defective, and emphasised that the scope of the draft norm of Article 256(2) of the Penal Code - taking into account the circumstances eliminating unlawfulness specified in § 3 - is too

broad and may cause the unjustified criminalisation of acts which do not bring about detrimental social consequences. The draft amendments to Article 256 of the Penal Code, submitted by a group of Sejm Deputies, were enacted, despite critical opinions and reservations presented in the course of the legislative process. The Tribunal has taken into consideration the critical comments voiced during the legislative process, when adjudicating the conformity of the challenged provisions to the Constitution. This concerns the issues of overlapping of the characteristics from Article 256(2) of the Penal Code with those from Article 256(1) of that Code, the issue of overlapping of the scope of criminalisation in those provisions, as well as the construct of the circumstances eliminating unlawfulness.

3. The standards and jurisprudence of other states and of the European Court of Human Rights.

3.1. Regulations and judicial practice in other European states.

3.1.1. Criminal law and law concerning misdemeanours in numerous European states prohibit inciting hatred based, *inter alia*, on nationality, creed, ethnicity or race. In the case of some states, relevant provisions also clearly refer to the preparation and distribution of materials or publications aimed at inciting such hatred. Detailed norms concerning the use of symbols associated with totalitarian movements exist in only a few states and they take on different forms. In the Criminal Code of the Federal Republic of Germany (§ 86) and the Criminal Code of the Republic of Albania (Article 225), the said norms refer to symbols related to organisations which have been deemed unconstitutional; in Lithuania (Article 188.18 of the Administrative Code) and Hungary (Section 269/B of the Criminal Code), they concern fascist, Nazi and communist symbols specified in the provisions; whereas in the codes concerning misdemeanours which are in force in Russia (Article 20.3) and Belarus (Article 17.10), they refer only to Nazi symbols. It is punishable to carry out activities related to producing, presenting and distributing those symbols, and in the case of the Slovakian regulation, which is the broadest in scope, also the possession of those symbols is punishable (§ 422c of the Slovakian Penal Code). The scope of sanctions provided for those activities range from a fine (also as the only sanction provided for such an offence – in Lithuania and Hungary) to the penalty of deprivation of liberty for a period of up to a few years (Slovakia and Germany). However, relevant provisions allow for exceptions to the presentation of prohibited symbols as part of activity related to

museum exhibitions, academic work, art, the provision of information or other similar activities.

3.1.2. In the context of the case under examination, it is of significance whether the criminalisation of the use of objects which comprise content related to a totalitarian system of government or which incite hatred depends on whether those objects are used in public for the purpose of promoting a totalitarian system of government or inciting hatred. The German and Hungarian jurisprudence regarding provisions which are similar to Article 256(2) of the Polish Penal Code will be presented here in greater detail.

3.1.3. The German regulation. In Germany, § 86 of the Criminal Code states that it is prohibited to disseminate, produce, stock, import, export or make publicly accessible through data storage media - for dissemination within Germany or abroad - propaganda materials of banned organisations (e.g. political parties which have been declared unconstitutional by the Federal Constitutional Court). At the same time, the legislator makes a proviso that the prohibition concerns the materials the content of which is directed against the free democratic constitutional order or the idea of the comity of nations. The said provision shall not apply if the propaganda materials or the act is meant to serve civil education, to avert unconstitutional movements, to promote art or science, research or teaching, the reporting about current or historical events or similar purposes. Another provision - § 86a of the German Criminal Code - regulates the use of symbols of unconstitutional organisations. It criminalises the distribution or public use of those symbols in a meeting or in written materials, as well as the production, stocking, import or export of objects which depict or contain such symbols, for distribution or use in Germany or abroad, providing for the penalty of imprisonment not exceeding three years or a fine. The German Code separately regulates the offence of incitement to hatred and the dissemination of materials inciting hatred (§ 130). It is punishable to disseminate, publicly display, post or present such materials, or otherwise make them accessible to others, including persons under eighteen, as well as to produce, obtain, supply, stock, offer, announce, commend, undertake to import or export them, in order to use them in any of the above-mentioned ways (§ 130(2)). The application of § 86a and § 103 of the German Criminal Code in specific cases was the subject of review by the Federal Constitutional Court of Germany. None of those provisions have been declared to be inconsistent with the Basic Law for the Federal Republic of Germany.

However, in the cases concerning the application of § 86a of the Criminal Code, the Federal Constitutional Court has stated that common courts, in an insufficient way,

took into account the necessity to protect the freedom of expression, or they infringed the principle of specificity of provisions. In the context of the case concerning the conviction of a person shouting the slogan "glory and honour to Waffen SS" ("*Ruhm und Ehre der Waffen-SS*") (the order of 1 June 2006 in the case 1 BvR 150/03), the Federal Constitutional Court concluded that the ruling had infringed the principle of specificity of law. In the opinion of the Federal Constitutional Court, the shouted slogan did not constitute a slogan of an unconstitutional organisation or a slogan which was similar to the extent that it could be mistaken with such a slogan, and the broadening interpretation of the courts adjudicating in the said case extended the application of the provision also to symbols which evoked an impression of being the symbols of an unconstitutional organisation, infringed the principle of specificity of law. In the order of 23 March 2006 (1 BvR 204/03), which was issued with relation to the conviction of the complainant for giving the Nazi salute, the Federal Constitutional Court stated that § 86a of the Criminal Code did not raise any constitutional doubts in a situation where the interpretation and application of the provision allowed for taking into account the freedom of expression protected under Article 5 of the Basic Law. In the case with the reference numbers 1 BvR 680/86 and 1 BvR 681/86 (the order of 3 April 1990), the Federal Constitutional Court of Germany reviewed the constitutionality of the application of § 86a of the Criminal Code in the context of the freedom of art. In that case, the complainants had been convicted of production and sale of T-shirts with satirical pictures, depicting, *inter alia*, Adolf Hitler with a swastika armband (in place of the swastika two crossed bars are shown) in front of the map of Europe, with the inscription under the picture which read "European Tour". The Federal Constitutional Court of Germany adjudicated that the conviction of the complainants violated the constitutional guarantee of artistic freedom, and that the content of the T-shirts had been inappropriately assessed, as the said content remained open to interpretation. In the view of the Federal Constitutional Court, the content of the T-shirts would have been excluded from the protection of the Basic Law only if satire had not come into consideration. The reasoning that, at first glance, the content of the T-shirts seems shocking does not justify excluding that content from the protection of artistic freedom. Also, the provision of § 130(4) of the Criminal Code was declared to be consistent with the Basic Law by the Federal Constitutional Court, in its order of 4 November 2009 (1 BvR 2150/08) concerning a ban on a public assembly to commemorate Rudolf Hess. The Federal Constitutional Court held that the said provision met the requirements of the principle of proportionality as regards the restriction of the

freedom of opinion. Indeed, the provision does not generally prohibit every type of dissemination of extremist or Nazi views, but it refers to the rule of arbitrary force in the shape in which it has become a historical reality and, aiming at the protection of public peace, it pursues a legitimate objective. With the application of an appropriate interpretation, its scope is sufficiently narrow.

Therefore, the Federal Constitutional Court draws attention to the precision and clarity of the criminal law provisions which provide for criminal liability for the use of symbols signifying a totalitarian regime. By contrast, it expects courts to interpret the said provisions in a precise way, taking into account the freedom of expression.

3.1.4. The Hungarian regulation. The Hungarian Criminal Code criminalises the use of certain symbols that have been enumerated therein. Section 269/B of the Code states that it is prohibited to distribute, use before a public assembly and exhibit in public: a swastika, the SS sign, an arrow-cross (the symbol of the Hungarian fascist movement, the hammer and sickle symbol, a five-pointed red star, or a symbol depicting any of the above. Any violation of that prohibition is subject to a fine, unless such conduct is required for the purposes of education, science, or art, or in order to provide information about history or current events, or concerns the present-day official symbols of the state.

Section 269/B of the Hungarian Criminal Code was subject to review conducted by the Constitutional Court of Hungary. In its judgment of 9 May 2000 (the case 14/2000 AB), the Court adjudicated that the said provision was consistent with the Constitution and international law. However, the Court noted that the assessment of constitutionality of specific provisions depended on the degree of precision and the scope of statutory definitions of prohibited acts. It stated that Section 269/B of the Criminal Code was precise and comprehensible, and thus it allowed the individual to adjust his/her conduct to conform to the requirements of the provision. At the same time, it does not constitute disproportionate interference with the realm of the individual's freedom of speech. Indeed, it is limited to three clearly specified types of conduct, which must have a public character for criminal liability to occur. The reviewed provision is a real measure for protecting democratic society, which is justified by the history of Hungary.

The judgment of the Hungarian Constitutional Court was the basis of the application lodged with the ECHR and the judgment of 8 July 2008 in the case of *Vajnai v. Hungary* (Application No. 33629/06). The ECHR did not share the view that the Hungarian regulation was sufficiently specific.

3.2. The regulations and court rulings of other European states, including in particular those from Germany and Hungary, allow the Tribunal to state that the criminalisation of preparation, distribution or publication of materials promoting a totalitarian regime or inciting hatred based on national, ethnic, race or religious differences is admissible, provided that criminal law regulations are precise enough that they do not constitute unjustified interference with the freedom of speech and do not allow for the use of a broadening interpretation. Indeed, the freedom of speech is a value which is subject to particular protection. Interference with that freedom by means of the regulation of criminal law requires precision and caution from both the legislator and courts. From the perspective of similar historical experience of Poland and Hungary as well as the requirements of specificity of criminal law provisions interfering with the realm of the freedom of speech, it is vital that that the Hungarian regulation that corresponds to Article 256(2) of the Criminal Code provides for criminal liability only in the case of the use of precisely defined symbols and on the condition that such use is public in character.

3.3. The ECHR judgment in the case of *Vajnai v. Hungary*.

3.3.1. In the case of *Vajnai v. Hungary*, the ECHR adjudicated that the conviction of a politician for the fact that he had worn a five-pointed red star at a legal and peaceful assembly constituted an infringement of Article 10 of the Convention (§ 58 of the judgment). The Court stated that, when freedom of expression is exercised as political speech – which may involve symbols which have multiple meanings – limitations are justified only in so far as there exists a clear, pressing and specific social need (§ 51 of the judgment). The Court noted that the Government had not shown that wearing the red star exclusively meant an identification with totalitarian ideas, as well as that it was offensive or shocking (§ 53 of the judgment). Therefore, the ban on wearing the red star was too broad in view of the multiple meanings of that symbol, as it could encompass activities and ideas which clearly belonged to those protected by Article 10 of the Convention (§ 54 of the judgment).

3.3.2. The ECHR examined Section 269/B of the Hungarian Criminal Code in the light of the requirement set out in Article 10 of the Convention. It stated that Section 269/B prohibited the use of symbols which had multiple meanings. Legal uncertainties in that regard may have a chilling effect on the freedom of expression and may be a cause of self-censorship (§ 54 of the judgment). The ECHR also ruled that the basis of imposing

restrictions on the freedom of speech, by way of a criminal sanction, may not merely be a fear of promoting a totalitarian system of government by means of a given symbol. The ECHR stressed that it was inapt that Section 269/B of the Hungarian Criminal Code did not require proof that the actual display amounted to totalitarian propaganda. The mere display is irrefutably considered to do so unless it serves scientific, artistic, informational or educational purposes. For those reasons the ECHR concluded that the prohibition under Section 269/B of that Code corroborated the finding that it was unacceptably broad (§ 56 of the judgment).

3.3.3. In the case under examination, the Constitutional Tribunal shares the view presented in its judgment of 18 October 2004, Ref. No. P 8/04, that the obligation to take into account the rulings of the ECHR, in the context of the activity of domestic organs of public authority, also obliges the Constitutional Tribunal to apply – within the scope of constitutional review – the rules and methods of interpretation which lead to resolving potential conflicts between the standards arising from the Polish law and those developed by the ECHR (OTK ZU No. 9/A/2004, item 92, point III 2.4.). In this context, the Tribunal assumes that the judgment in the case of *Vajnai v. Hungary* is of significance for the review of the provisions challenged in the present case. Although - pursuant to Article 46 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties - third parties, which are among the High Contracting Parties, should aim at shaping the system of the protection of human rights in such a way that they could, as much as possible, take into account the standards arrived at in the jurisprudence of the ECHR in the context of the Convention. In the Interlaken Declaration of 19 February 2010, which summed up the High Level Conference on the Future of the European Court of Human Rights, the Members of the Council of Europe committed themselves to "taking into account the Court's developing case-law, also with a view to considering the conclusions to be drawn from a judgment finding a violation of the Convention by another State, where the same problem of principle exists within their own legal system" (point B.4.c of the Declaration).

Therefore, considering the similarity between legal regulations in Hungary and those in Poland, the Tribunal has considered consequences ensuing from the jurisprudence of the ECHR for the assessment of the Polish regulation. In particular, the Tribunal has examined whether Article 256(2) and (3) of the Penal Code does not provide for a criminal

sanction for conduct related to symbols which may have multiple meanings, or whether the said provision, due to lacking sufficient specificity, does not violate the freedom of speech.

4. Higher-level norms for the constitutional review.

4.1. Article 42(1) in conjunction with Article 54(1) of the Constitution.

As one of higher-level norms for the review, the applicants have indicated Article 42 of the Constitution. What follows from the substantiation of the application is that the applicants actually question the conformity of the challenged provision to Article 42(1) of the Constitution; they argue that the provision does not comply with the principle that a prohibition or a requirement involving a criminal sanction should be formulated in a precise and consistent way (the principle of *nullum crimen sine lege penali anteriori*).

4.1.1. In the judgment of 9 June 2010 in the case SK 52/08 (OTK ZU nr 5/A/2010, item 50, point III 1.1.), the Tribunal stated that the said principle is meant for the legal protection of the individual against arbitrariness and abuse of power on the part of the organs of public authority. The Tribunal indicated that the following specific principles arise therefrom:

1) prohibited acts must be specified by statute (*nullum crimen sine lege scripta*),
2) types of offences must be specified in the most precise way (*nullum crimen sine lege certa*),
3) it is inadmissible to apply a broadening analogy and interpretation (which are disadvantageous to the perpetrator),
4) a criminal law statute which introduces criminal liability or which changes given liability into more severe one may not be retroactive (*nullum crimen sine lege praevia, lex retro non agit*),
5) The provision of a criminal law statute must satisfy the test of calculability and predictability of legal effects as regards the actions of the addressee of the provision.

4.1.2. In the case SK 52/08, the Tribunal emphasised that: “the requirement of specificity (*nullum crimen sine lege*) is not met by the provision of a criminal law statute when the addressee of a criminal law norm is not able to reconstruct, solely on the basis of the provision, the essential characteristics of a prohibited act. A provision of a criminal law statute must allow a party that is subject to criminal liability to have a real possibility of such reconstruction of criminal law consequences of conduct. If the result of such a test if

positive, then a given provision of criminal law is consistent with the principles of *nullum crimen sine lege scripta* and *nullum crimen sine lege certa*. However, these principles guarantee that only the perpetrator of an act prohibited by statute may be held criminally liable, and not that such a statute will contain a description of every possible action which exhausts the characteristics of that prohibited act" (point III 5.3.).

Also, the Tribunal have stated that:

1) a criminal law norm should, in an unambiguous way, indicate both the person who is the addressee thereof, the characteristics of a prohibited act, as well as the type of a criminal sanction imposed for the commission of that prohibited act;
2) the principle of specificity indicated in Article 42 of the Constitution obliges the legislator to indicate a prohibited act (the characteristics thereof) in such a way that neither the addressee of the criminal law norm nor the organs of public authority which are responsible for applying the law and decoding the content of the regulation, by way of interpretation of the criminal law norm, would have any doubts as to whether certain conduct *in concreto* matches these characteristics;
3) since the statute introduces a penalty in the case of prohibited conduct, the individual may not be left unaware as to whether certain conduct constitutes a prohibited act subject to such a sanction or not.

Therefore, any general indication which allows for the far-reaching freedom of interpretation concerning the scope of characteristics of a prohibited act or certain types of conduct may not be regarded as fulfilling the requirement of specificity in the light of 42(1) of the Constitution (see also the judgments of: 26 November 2003, SK 22/02, OTK ZU No. 9/A/2003, item 97, point III ; 5 May 2004, P 2/03, OTK ZU No. 5/A/2004, item 39, point III 3.5.; 13 May 2008, P 50/07, OTK ZU No. 4/A/2008, item 58, point III 1.).

4.1.3. The most stringent requirements of specificity should be met by criminal law provisions which interfere with the realm of freedom of speech. Its significance in democratic society has on a number of occasions been stressed in the jurisprudence of the Tribunal, including the judgments concerning the constitutionality of criminal law provisions (cf. the judgments of: 11 October 2006, P 3/06, OTK ZU No. 9/A/2006, item 121; 30 October 2006, P 10/06, OTK ZU No. 9/A/2006, item 128; 12 May 2008, SK 43/05, OTK ZU No. 4/A/2008, item 57).

4.1.4. In the opinion of the Tribunal, the meaning of terms lacking sufficient specificity in the case of criminal law may not be determined arbitrarily *ad casu* by the

organs of the state. Therefore, in the present case, the Tribunal maintains its previously presented view that the use of a phrase lacking sufficient specificity requires the existence of special procedural guarantees which ensure clarity and evaluative character of the practice of assigning specific content to an imprecise term, by an organ taking a decision about such assignment (see the judgment of 16 January 2006, SK 30/05, OTK ZU No. 1/A/2006, item 2, point III 5.)

4.1.5. The requirement of specificity of criminal law provisions should be perceived in the context of the general requirement of specificity of legal provisions (cf. the judgment of the Constitutional Tribunal of 22 June 2010, SK 25/08, OTK ZU No. 5/A/2010, item 51, point III 2.2.). The said requirement stems from the principle of a democratic state ruled by law (Article 2 of the Constitution), which constitutes one of the requirements of appropriate legislation; it applies in the case of any regulations that shape the legal situation of the citizen (see, among others, the judgment of the Constitutional Tribunal of: 28 October 2009, Kp 3/09, OTK ZU No. 9/A/2009, item 138, point III 6.1.; 3 December 2009, Kp 8/09, OTK ZU No. 11/A/2009, item 164, point III 5.1.). In the judgment in the case Kp 3/09 (point III 6.2.), the Tribunal (full bench) stated that it was the legislator's obligation to create legal provisions which were as specific as possible in respect of both content and form. The Tribunal also adjudicated that there was a need to carry out the test of specificity of law which should be applied to every examined regulation. The said test comprises the following criteria: 1) precision of a legal regulation, 2) clarity of a provision and 3) its legislative correctness. Precision "should be manifested in the specificity of imposed obligations and granted rights so that their content would be unambiguous and would allow for reinforcement" (the judgment of 21 March 2001, K 24/00, OTK ZU No. 3/2001, item 51, point III 18.). The clarity of a provision means its lucidity and comprehensibility to its addressees that have the right to expect from a rational legislator that he will create legal norms which raise no doubts as to the content of the imposed obligations and granted rights (see the case Kp 8/09, point III 5.1.). By contrast, the correctness of a provision means its proper formulation from the linguistic and logical point of view, and it is a basic requirement allowing to assess the provision in respect of other criteria – clarity and precision (*ibidem*). It is necessary to apply the indicated test in the course of conducting a constitutional review and then to refer it, while maintaining appropriate proportion, to the character of a given regulation under examination (see the case Kp 3/09, point III 6.3.). As regards the last aspect, what is of significance is the type of the regulated subject-matter, the category of the addressees of the provision, as well as

the degree of interference of the proposed regulations with constitutional rights and freedoms.

4.1.6. In the present case, the Tribunal maintains its views established in its jurisprudence, as regards the legislator's obligation to fulfil the requirement of specificity of legal provisions in general as well as special requirements concerning criminal law provisions, namely:

1) a criminal law provision should be characterised by precision, clarity and legislative correctness;
2) the addressee of a criminal law norm should be able to reconstruct – solely on the basis of the provisions specifying it, i.e. by applying only the rules of linguistic interpretation – the essential characteristics of a prohibited act;
3) the individual should not be left in a state of uncertainty as to whether certain conduct constitutes a prohibited act or not;
4) a criminal law norm should, in an unambiguous way, indicate both the person who is the addressee thereof, the characteristics of a prohibited act, as well as the type of a criminal sanction imposed for the commission of that prohibited act;
5) the use of terms which lack sufficient specificity or which are ambiguous in criminal law requires the existence of special procedural guarantees which ensure the clarity and evaluative character of the practice of assigning specific content to an imprecise term by a given organ of the state.

4.1.7. The Tribunal assumes that, in the present case, the main higher-level norm for the constitutional review is Article 42(1) of the Constitution. A provision which is in conjunction with it is Article 54(1) of the Constitution. Indeed, the lack of specificity of the challenged regulation of the Penal Code may pose a threat to the freedom of speech. The said lack of specificity may result in criminalising the speech and conduct which express the views protected under Article 54(1) of the Constitution. Article 2 of the Constitution, which has also been indicated by the applicants as a higher-level norm for the review, is not an autonomous higher-level norm for review in the case under examination. Indeed, the general principle of specificity of legal provisions, which arises therefrom, is made more specific – with regard to criminal law provisions – in Article 42(1) of the Constitution (cf. the judgment in the case SK 25/08, point III 2.2.).

4.2. Other higher-level norms for the review.

4.2.1. Subjecting Article 256(2) and (3) of the Penal Code to the review of its

conformity to Article 54(1) in conjunction with Article 31(1) of the Constitution depends on the answer to the question whether the challenged regulation meets the requirements of specificity of criminal law. Indeed, only an affirmative answer to that question will allow for the review of proportionality of statutory interference with the freedom of speech (including the examination whether the sanction provided for in Article 256(2) of the Penal Code is proportional). By contrast, in the case of a negative answer, there will be no need for such a review. However, bearing in mind the content of the application in the present case, the Tribunal notes that the review of the conformity of Article 256(2) of the Penal Code to Article 54(1) in conjunction with Article 31(3) of the Constitution is possible only insofar as criminalisation concerns producing, recording or importing, purchasing, storing, possessing, presenting, transporting or sending – for the purpose of dissemination– printed materials, recordings or other objects being carriers of fascist, communist or other totalitarian symbols. The Tribunal shares the view of the Marshal of the Sejm that only in that part the content of Article 256(2) of the Penal Code remains in relation to Article 256(1) of the Penal Code. The applicants have not challenged the constitutionality of the criminalisation of the conduct covered by Article 256(1) of the Penal Code, and thus the content referred to in Article 256(2) of the Penal Code. Therefore, the Tribunal concludes that, in the present case, it is inadmissible to review the conformity Article 256(2) of the Penal Code - insofar as it provides for the criminalisation of producing, recording or importing, purchasing, storing, possessing, presenting, transporting or sending – for the purpose of dissemination– printed materials, recordings or other objects comprising the content specified in § 1 – to Article 54(1) in conjunction with Article 31(3) of the Constitution.

4.2.2. It follows from the substantiation of the application that, when indicating the provisions of the ratified international agreements – Article 9, Article 10 in conjunction with Article 17 of the Convention, and Article 19 of the ICCPR – as higher-level norms for the review, the applicants have not gone beyond citing the content of the higher-level norm for the review from the Constitution, i.e. Article 54(1) in the context of specificity of criminal law (Article 42(1) of the Constitution). The allegations formulated on the basis of the above-mentioned norms are identical. Carrying out the assessment of conformity of the challenged provision to the higher-level norm for the review formulated in Article 54(1) of the Constitution makes it unnecessary for the Tribunal to present its views as regards the assessment of the conformity of the indicated provision to the indicated higher-level norms for the review from international law (see e.g. the judgment of 4 November 2010, K 19/06,

OTK ZU No. 9/A/2010, item 96, point 11; see also the judgment of 18 October 2004, P 8/04, part III point 5.). Therefore, the Tribunal concludes that the indicated provisions of international law – Article 9, Article 10 in conjunction with Article 17 of the Convention, and Article 19 of the ICCPR – constitute inadequate higher-level norms for the review in the present case.

5. The issue of conformity of Article 256(2) and (3) of the Penal Code to the Constitution.

5.1. The conformity of Article 256(2) of the Penal Code to Article 42(1) in conjunction with Article 54(1) and (2) of the Constitution.

5.1.1. The specificity of the criminalisation of producing, recording, importing, purchasing, storing, possessing, presenting, transporting or sending – for the purpose of dissemination – printed materials, recordings or other objects comprising the content specified in Article 256(1) of the Penal Code.

5.1.1.1. What is subject to constitutional review in the present case, in the first place, is the fulfilment of the requirements of specificity of criminal law provisions by Article 256(2) of the Penal Code, insofar as it provides for the criminalisation of producing, recording, importing, purchasing, storing, possessing, presenting, transporting or sending – for the purpose of dissemination – printed materials, recordings or other objects comprising the content specified in Article 256(1) of the Penal Code. The Tribunal notes that, when applying the rules of literal interpretation, it is difficult to reconstruct a norm on the basis of the phrase "the content specified in § 1". However, it follows from the explanatory note for the amendments to Article 256 of the Penal Code that the legislator's intention was to criminalise activities carried out with the use of objects serving the purposes set out in Article 256(1) of the Penal Code, i.e. promoting a fascist or other totalitarian system of government or inciting hatred based on national, ethnic, race or religious differences or for reason of lack of any religious denomination**.** Therefore, the Tribunal assumes that what is meant here is "the contents" rather than "the content specified in § 1".

5.1.1.2. In the light of the principle of specificity of criminal law provisions, it is necessary for the purpose of dissemination, as mentioned in Article 256(2) of the Penal Code, to refer to precisely specified types of conduct. In the light of Article 256(2) of the Penal Code, such types of conduct partially overlap: storing implies possessing a given

object; possessing precedes presenting, transporting and sending; producing, importing and purchasing lead to possessing. These actions – provided that they constitute the way of public promoting of a totalitarian system of government or the way of inciting hatred – are moreover forbidden on the basis of Article 256(1) of the Penal Code. This results in the overlapping of the scope of criminalisation specified in Article 256(1) with the one from Article 256(2) of the Penal Code.

5.1.1.3. Such formulation of a provision does not weigh in favour of its lack of specificity. The Tribunal shares the view of the Marshal of the Sejm and the Public Prosecutor-General that Article 256(2) of the Penal Code indicates the purpose of a given act. Article 256(2) of the Penal Code concerns an act committed for "the purpose of dissemination". Even if considering the fact that the legislator has used the term "other objects" in the content of Article 256(2) of the Penal Code, it may not be regarded – as the applicants would like – that the aim of the challenged regulation is to "introduce the criminalisation of every instance of possession of an object comprising the content specified in Article 256(1) of the Penal Code". This is also confirmed by the content of Article 256(3) of the Penal Code, which eliminates the unlawfulness of actions undertaken as part of artistic, educational, collecting or academic activity". In addition, the insufficient specificity of the analysed excerpt of Article 256(2) of the Penal Code may not be justified by the lack of public character of the types of conduct described in the provision. Indeed, what follows from the nature of such types of conduct – i.e. producing, recording, importing, purchasing, storing and possessing - is their non-public character. Such types of conduct may constitute preliminary actions with regard to the types of conduct set out in Article 256(1) of the Penal Code, which are public in character. Sharing the view of the Public Prosecutor-General and the Marshal of the Sejm, the Tribunal also notes that the types of conduct set out in Article 256(1) of the Penal Code constitute already existing terms, occurring in other provisions of the Penal Code (e.g. in Article 202(3) of the Penal Code). For these reasons, the Tribunal assumes that the analysed excerpt of Article 256(1) of the Penal Code does not specify the requirements of specificity of criminal law provisions.

5.1.1.4. As a side remark, the Tribunal notes that Article 256(2) of the Penal Code does not prohibit the sale of the objects described therein – it does not fully meet the aim of the amendments which was declared by the authors thereof.

5.1.1.5. Moreover, the Tribunal notes that although, in Article 256(2), the legislator equally criminalises the actions aimed at promoting the extremely right-wing

system of government (fascism) as well as the extremely left-wing system of government (communism), as regards the realm of ideological foundations of those regimes, the legislator limits himself only to the first one, imposing – in Article 256(1) of the Penal Code - prohibition against inciting hatred based on national, ethnic, race or religious differences, overlooking the case of stirring up hatred based on social class differences. By contrast, public propagating and inciting hatred based on social class differences have been the basis of official ideology or of political programme of the extreme left-wing factions in many countries (see T. Snyder, *Skrwawione ziemie. Europa między Hitlerem a Stalinem*, Warszawa 2011, *passim*). Such a narrowed-down regulation of Article 256(1) of the Penal Code most likely constitutes a reflection of the content, adopted in 1966 by the United Nations, in Article 20(2) of the ICCPR, which stipulates that: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law". This means that the international law-maker has specified, in an incomplete way, the scope of propagating hatred in the context of communist ideology.

5.1.2. The specificity of the criminalisation of producing, recording, importing, purchasing, storing, possessing, presenting, transporting or sending – for the purpose of dissemination – printed materials, recordings or other objects being carriers of fascist, communist or other totalitarian symbols.

5.1.2.1. Pursuant to Article 256(2) of the Penal Code, the following are subject to criminal liability: producing, recording, importing, purchasing, storing, possessing, presenting, transporting or sending – for the purpose of dissemination– printed materials, recordings or other objects being carriers of fascist, communist or other totalitarian symbols. It is admissible in the jurisprudence of the Tribunal – under precisely specified conditions – to use terms lacking sufficient specificity in criminal law (cf. the judgments in the cases: SK 43/05, point III 8.5., and SK 52/08, point III 5.3.). However, if there is a term lacking sufficient specificity in a criminal law provision, the legislator should be expected to provide the utmost precision in the description of the characteristics of that act. In that context, the Tribunal has considered whether the characteristics have been specified in a manner which provided a sufficient degree of precision in the course of determining their meanings and legal effects. Thus, what is subject to constitutional review is the specificity of the following phrase: "printed materials, recordings or other objects being carriers of fascist, communist or other totalitarian symbols". The Tribunal's conclusions from point 5.1.1.3., which concern the specificity of types of conduct described in Article 256(2) of the Penal Code, remain relevant here.

5.1.2.2. The Tribunal states that the use of the phrase "printed materials, recordings or other objects being carriers of fascist, communist or other totalitarian symbols" in a criminal law provision infringes the principle of specificity of criminal law provisions. The Tribunal shares the doubts raised by the authors of commentaries on Article 256(2) of the Penal Code. They have *inter alia* indicated that "it is not known whether a symbol of communism will be considered to be a red flag, or maybe, for instance, this would have to be a red flag with a sickle and hammer, or maybe a T-shirt with an image of Che Guevara (E. Pływaczewski, A. Sakowicz, commentary on Article 256 of the Penal Code, point III.18., [in:] *Kodeks karny. Część szczególna,* commentary on Articles 222-316, Vol. II, A. Wąsek, R. Zawłocki (eds.), Warszawa 2010) as well as that "Article 256(2) will cause serious practical problems. In a majority of states, there is no equivalent to the provision of Article 256(2) of the Polish Penal Code; in many countries, communist parties may legally conduct their activity (M. Mozgawa, commentary on Article 256 of the Penal Code, point 12, [in:] M. Mozgawa (ed.), M. Budyn-Kulik, P. Kozłowska-Kalisz, M. Kulik, *Kodeks karny. Komentarz praktyczny*, Oficyna, 2010, 3rd Edition, LEX 2010).

These comments are also true with regard to objects being carriers of fascist symbols. Indeed, apart from the swastika, which is clearly associated with the national socialism and its crimes against humanity, there are other symbols which, while being related to fascism, could have other meanings.

5.1.2.3. Making reference to the ECHR judgment in the case of *Vajnai v. Hungary,* within that scope, the Tribunal states that the use of symbols which have multiple meanings may not be subject to criminal liability. It is worth drawing attention to the fact that the ECHR has considered the provision of the Hungarian Criminal Code, which is much more precise than the provision under review in the present case, to be too ambiguous (see point 3.1.4. of this statement of reasons). The Hungarian provision enumerated symbols the use of which was prohibited. Despite that, the ECHR stated that, due to the ambiguity of the symbol, i.e. the five-pointed red star, it was necessary for criminal liability to occur to use the symbol to propagate a totalitarian regime (cf. § 56 of the judgment). The reviewed phrase in Article 256(2) of the Penal Code does not contain a closed list of symbols the use of which is prohibited. It is an ambiguous regulation and it lacks sufficient specificity. It may pose a more serious threat to the freedom of speech than the provisions of the Hungarian Criminal Code, which were assessed negatively by the ECHR.

5.1.2.4. Moreover, the Tribunal shares the opinion of the Marshal of the Sejm that the lack of sufficient specificity in the case of the reviewed excerpt from Article 256(2) of the Penal Code is not compensated for by the circumstances eliminating unlawfulness, regulated in Article 256(3) of the Penal Code. Indeed, it does not explain the imprecision of "fascist, communist or other totalitarian symbols", and thus "the insufficiently specified scope of criminality" of Article 256(2) of the Penal Code. The authors of the commentaries have posed apt questions as to whether the act would not be regarded as unlawful in the case of a person who wore a symbol associated with a totalitarian system of government on his/her clothes in public, and in particular whether s/he would be able to prove that his/her conduct constituted part of artistic activity (cf. E. Pływaczewski, A. Sakowicz, commentary on Article 256 of the Penal Code, point III.19., [in:] A. Wąsek, R. Zawłocki, *op.cit.*). In the opinion of the Tribunal, this seems unlikely, as such conduct may not be regarded as artistic activity. It may, however, constitute the expression of aesthetic or anti-totalitarian views; the criminalisation of such expression is not eliminated by Article 256(3) of the Penal Code. As a result, on the basis of Article 256(2) of the Penal Code, conduct which does not bring about detrimental social consequences may be subject to criminal liability, for instance, in the case of fierce criticism of totalitarian attitudes and views in public by means of printed materials, recordings or other objects being carriers of fascist, communist or other totalitarian symbols.

5.1.2.5. In addition, the reviewed excerpt of Article 256(2) of the Penal Code – the provision that contains terms lacking sufficient specificity – is not accompanied by sufficient procedural guarantees. Instituting criminal proceedings hastily with regard to the case concerning "fascist, communist or other totalitarian symbols", even if the outcome of the proceedings proved to be positive for the suspect (the accused), could lead to – apart from unnecessary interference with the rights of the individual – the chilling effect in the public debate and, may not be ruled out, could strengthen extremist political factions which use the examples of the state's repressive methods to gain new supporters.

5.1.2.6. In conclusion, the Tribunal states that Article 256(2) of the Penal Code, insofar as it provides for the criminalisation of producing, recording, importing, purchasing, storing, possessing, presenting, transporting or sending – for the purpose of dissemination– printed materials, recordings or other objects being carriers of totalitarian symbols, does not meet the criteria for specificity applicable in the context of criminal law provisions; it is formulated in an imprecise, unclear and incorrect way. This, in turn, results in the uncertainty of the legal situation of persons who – for various reasons – wish to use

symbols which may be regarded as totalitarian. Therefore, Article 256(2) of the Penal Code - in the part containing the wording “or other objects being carriers of fascist, communist or other totalitarian symbols” – is inconsistent with Article 42(1) in conjunction with Article 54(1) and (2) of the Constitution.

5.1.2.7. As regards adjudicating on the non-conformity of Article 256(2) of the Penal Code (within the indicated scope) to Article 42(1) in conjunction with Article 54(1) of the Constitution, the Tribunal states that issuing a ruling is useless as regards the conformity (within that scope) of Article 256(2) of the Penal Code to Article 54(1) in conjunction with Article 31(3) of the Constitution (including the uselessness of examining whether the stipulated sanction is disproportionate). The Tribunal once again wishes to emphasise that the lack of specificity of Article 256(2) of the Penal Code, which is required in the context of criminal law provisions, in itself violates the freedom of speech, protected under Article 54(1) of the Constitution.

5.2. The conformity of Article 256(3) of the Penal Code to Article 42(1) in conjunction with Article 54(1) and (2) of the Constitution as well as to Article 54(1) in conjunction with Article 31(3) of the Constitution.

Pursuant to the version of Article 256(3) of the Penal Code which was eventually enacted, the perpetrator of the act prohibited under Article 256(2) of the Code shall not commit an offence, if the said act was committed as part of artistic, educational, collecting or academic activity.

The Tribunal shares the stance of the Marshal of the Sejm that it may not be alleged that Article 256(3) of the Penal Code – as such - lacks specificity. The fact that the construct of the circumstances eliminating unlawfulness does not compensate for the lack of specificity of Article 256(2) of the Penal Code does result in the lack of specificity on the part of Article 256(3) of the said Code. The Tribunal notes that the legislator has narrowly delineated the circumstances eliminating unlawfulness of the prohibited act, and that the expression of aesthetic and anti-totalitarian views which may not be classified as artistic, educational, collecting or academic activity remains outside the scope of the elimination of unlawfulness. However, the problem stems from the lack of specificity of the indicated excerpt from Article 256(2) of the Penal Code, and not from the very construct of the circumstances eliminating unlawfulness.

The Tribunal also shares the stance of the Marshal of the Sejm that Article 256(3) of the Penal Code is consistent with Article 54(1) in conjunction with Article 31(3) of the

Constitution. For the reasons indicated in point 4.2.1. of this statement of reasons as well as due to declaring the (partial) non-conformity of Article 256(2) of the Penal Code to Article 42(1) in conjunction with Article 54(1) and (2) of the Constitution, Article 256(2) of the Penal Code has not been reviewed by the Tribunal in respect of its conformity to Article 54(1) in conjunction with Article 31(3) of the Constitution. However, if this were to be done, then one should look for potential sources of disproportionate interference with the freedom of speech in the content of Article 256(2) of the Penal Code. By contrast, such a situation does not occur in the case of Article 256(3) of the Penal Code. The said provision narrows down, rather than extends, the admissible scope of interference with the freedom of speech from Article 256(2) of the Penal Code.

6. The effects of the judgment.

Declaring Article 256(2) *in fine* of the Penal Code to be unconstitutional entails that the application of Article 256(4) will be limited. On the basis thereof, a given court will be able to adjudicate on the forfeiture of objects with the content specified in Article 256(1) of the Penal Code. However, this will not be possible with regard to objects being carriers of fascist, communist or other totalitarian symbols.