24 Content Neutrality and the Limitation of Free Speech

The Relevance of an American Principle in the Case-Law of the Constitutional Court of Hungary

Bernát Török[*]

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Abstract
Content neutrality is arguably the most frequently mentioned principle of free speech doctrine both in legal theory and in legal practice. While it is well-known how important it is in the jurisprudence of the US, it generally remains obscure whether content neutrality is of true relevance for European jurisdictions. This article argues that the Hungarian doctrine of freedom of expression urges us to answer affirmatively. The case-law of the Hungarian Constitutional Court from the last three decades clearly demonstrates that although along with serious challenges to be responded to, content neutrality is a fundamental element of constitutional adjudication in the Hungarian doctrine. With its key concept of 'external boundaries of free speech', the Constitutional Court builds on the principle that restrictions should not be based on the fact that the content of speech is unacceptable, unworthy or wrong, and limitation on speech should be justified not by referring to its content alone but by referring to its context. After exploring the relevant case-law of the Constitutional Court and identifying the challenges this principle is facing in Hungarian doctrine, this article aims to construe valid theses of content neutrality in Hungarian law.

24.1 Introduction

It became a commonplace to say, even among international experts of freedom of expression, that while the US free speech doctrine is built on the strict rule of content neutrality,

* Bernát Török: associate professor, National University of Public Service, Budapest.

this principle is not of relevance at all in European jurisdictions. The importance of the distinction between content-based and content-neutral interventions, the argument follows, is simply a result of an optical illusion for European eyes due to the predominance of US literature, and European legal theory is actually built on different foundations. As it is usually the case with commonplaces: although it speaks about a real phenomenon to some extent, we can clearly demonstrate that it is a misleading oversimplification of the subject – at least in terms of the Hungarian jurisdiction.[1]

The truth is that an in-depth study of the principle of content neutrality is not only helpful but simply unavoidable when clarifying the Hungarian free speech doctrine. There are several reasons for this. Above all, of course, the case-law of the Hungarian Constitutional Court itself, according to which the content neutrality of restricting communication is a fundamental element in constitutional adjudication. We will see that the issue in question is just the area where the Hungarian practice has incorporated more from the US approach. It is certainly still not to say that the Hungarian doctrine would construct the practice of freedom of expression in the same way as it has been done overseas, but it is absolutely clear that the Hungarian argument has introduced a test focusing on content neutrality more, than the European average.

It is a completely separate issue that those who criticize the thesis of content neutrality are quite right that in the Hungarian case-law it is faced with powerful challenges. According to the concurring opinion written to Decision No. 95/2008. (VII. 3.) AB, this thesis in the Hungarian practice is "objectionable from a methodological point of view" and resulted in a 'distortion' in the decisions of the Constitutional Court.[2] The concurring opinion rightly points out that

> "besides decisions based on the principle of content neutrality, there are also decisions in the relevant case-law of the Constitutional Court that follow the principle of content-based restriction".[3]

However, the fact that it is challenging to clarify the exact meaning of content neutrality in the Hungarian doctrine does not mean that the principle is not of high relevance. The academic discussion overseas is encouraging in this regard: even in the US where content neutrality is without doubt the starting point for all free speech assessment, the correct place of this principle is strongly debated. It suffices to refer to some telling conclusions in literature. Geoffrey Stone argues that the hardest issue in contemporary free speech

1 This article is an adapted version of a book chapter on the subject published in Hungarian: Bernát Török, *Szabadon szólni, demokráciában. A szólásszabadság magyar doktrínája az amerikai jogirodalom tükrében*, HVG-ORAC, Budapest, 2018.

2 Decision No. 95/2008. (VII. 3.) AB, Concurring opinion by Miklós Lévay, I.1., ABH 2008, 804.

3 Id. I.2., ABH 2008, 804.

doctrine is the difference between content-based and content-neutral restrictions.[4] Steven Shiffrin sets out as one of the first honest starting points for building the right methodology of free speech that while the doctrine teaches that freedom of speech means that the government has no power to restrict expression because of its content, "any assessment of the legal regulation of communication must begin with the recognition that government does have power to restrict expression because of its content."[5] And then it is not surprising that some, such as Martin Redish, find it timely to rethink and, as a result, get rid of the approach based on content neutrality.[6]

Because of these challenges, trying to find the true meaning and place of the principle mentioned consistently also in Hungarian case-law and legal literature is a matter of urgency. This article first explores the relevant case-law of the Constitutional Court, then construes the findings in light of the most influential literature, and finally enumerates the valid theses of content neutrality in Hungarian law.

24.2 The Concept of 'External Boundary'

That the arguments regarding content neutrality of restrictions in the Hungarian practice of freedom of expression would play an important role seem predictable from the outset. Decision No. 30/1992. (V. 26.) AB stated as the fundamental thesis of distinguishing between incitement to hatred and group defamation that the right to free expression protects opinions regardless of their value and veracity. According to the classic Hungarian formulation of content neutrality,

> "freedom of expression has only external boundaries; as long as it does not interfere with such a constitutionally drawn external boundary, the opportunity and fact of expression itself is protected, irrespective of its content".[7]

4 Geoffrey R. Stone, 'Content Regulation and the First Amendment', *William and Mary Law Review*, Vol. 25, Issue 2, 1983-1984, p. 189.

5 Steven Shiffrin, 'Defamatory Non-Media Speech and First Amendment Methodology', *UCLA Law Review*, Vol. 25, Issue 5, 1977-1978, p. 955.

6 Martin H. Redish, 'The Content Distinction in First Amendment Analysis', *Stanford Law Review*, Vol. 34, Issue 1, 1981-1982, p. 114. For a comprehensive overview of Redish's theory, *see* Martin H. Redish, *The Adversary First Amendment. Free Expression and Foundations of American Democracy*, Cambridge University Press, 2013. There are others joining Redish in his radical conclusion, *see* R. George Wright, 'Content-based and Content-neutral Regulation of Speech: The Limitations of a Common Distinction', *University of Miami Law Review*, Vol. 60, Issue 3, 2005-2006, p. 364.

7 Decision No. 30/1992. (V. 26.) AB, Reasoning V.3., ABH 1992, 167, 179.

According to this logic, the Constitutional Court's decision stated that while incitement to hatred collides with the external boundaries of freedom of expression, such an external boundary could no longer be drawn constitutionally when it comes to group defamation.

What seemed only very likely that time, later became obvious: the above arguments have turned into the central consideration of the Hungarian doctrine of free speech, making content neutrality a crucial element in constitutional adjudication. First, the thesis of the 1992 reasoning quoted above became a well-established formula of subsequent decisions: to all intents and purposes, we do not find an important decision that would not refer to it in some form.[8] Second, it is obviously not just a revered reference, since the interpretations of the Constitutional Court analyzing freedom of expression and freedom of the press in a more encompassing manner, almost without exception add a novel twist to the previous passages. For example, according to Decision No. 57/2001. (XII. 5.) AB, freedom of expression means "the opportunity of communication that does not depend on its content or its potentially harmful, offensive nature".[9] Decision No. 95/2008. (VII. 3.) AB argues that "a constitutional democracy does not repress extremist voices simply because of their content."[10] In the formulation of Decision No. 7/2014. (III. 7.) AB, the right to individual expression is unthinkable without "anyone having the freedom to disclose his or her opinions and thoughts to others without any restriction of content",[11] while Decision No. 13/2014. (IV. 18.) AB states, in the context of political speech, that this freedom applies to all members of the political community, regardless of content.[12] In addition, in the field of press freedom, Decision No. 19/2014. (V. 30.) AB summarizes previous references as

> "the range of protection for the freedom of the press is independent of the content of the opinion; it does not protect the content of the opinion but the process and means of communicating opinions".[13]

All these examples show that the content-related assessment of restrictions is a significant element of Hungarian doctrine. The most important point in the chain of decisions in this respect is the requirement of 'external boundaries' to restricting freedom of expression and the press. In practice, the method of separating content-based and content-neutral restrictions in domestic practice is to identify the external boundary: in the case of a con-

8 Examples of literal reference are included, *inter alia* in Decisions No. 36/1994. (VI. 24.) AB, 18/2004. (V. 25.) AB, 75/2008. (V. 29.) AB, 95/2008. (VII. 3.) AB, 96/2008. (VII. 3.) AB.
9 Decision No. 57/2001. (XII. 5.) AB, Reasoning II.6., ABH 2001, 484, 492.
10 Decision No. 95/2008. (VII. 3.) AB, Reasoning III.3.4., ABH 2008, 782, 789.
11 Decision No. 7/2014. (III. 7.) AB, Reasoning [39].
12 Decision No. 13/2014. (IV. 18.) AB, Reasoning [25].
13 Decision No. 19/2014. (V. 30.) AB, Reasoning [55].

stitutionally identifiable external boundary, the restriction of free speech can be justified, while in the absence of this, the restriction cannot be justified. Therefore, in order to assess the relevance of content neutrality in Hungary, we first have to look at what the term 'external boundary' covers.

24.3 Limits Truly Independent of Content

First of all, it is worth starting the clarification of Hungarian doctrine by examining what is not covered by this term. We must admit that a significant part of our 'content neutrality' would clearly be considered a strict limitation of content overseas. Finding the external boundary in the most important cases of Hungarian case-law often arises in a context that the consensus of the US discourse on free speech treats as an area of content-based interventions. While in Hungary the standard of incitement to hatred, focusing on the foreseeable consequences of speech, is the textbook example for the external boundary; the more stringent clear and present danger test of the US case-law is the constitutional exception to otherwise prohibited content-based interventions.[14] The Hungarian concept of content neutrality thus unsurprisingly differs from its classic definitions in US literature. It is clear that the Hungarian test for incitement meets Ely's criteria is triggered only in case of an audience that understands the language of the speaker,[15] and it is also obviously not independent of the communicative effect of speech, already considered by the majority of theorists as the most important aspect of content-based restrictions.[16] Thus, the observer of Hungarian legal practice must admit that, in many cases, the external boundary is not a standard that can be determined irrespective of the content or communicative effect of speech. When the domestic doctrine separates internal/content-based limitations and external/content-neutral limitations from each other, it in fact calls for a careful consideration of other aspects.

It does not follow, of course, that the concept of 'external boundary' would not include, in the first place, restrictions that are truly independent of the content of speech. Yet analysis of the Hungarian practice does not pay much attention to this aspect, since petitioners have not turned to the Constitutional Court with such cases, so the concept of the external boundary has attracted more attention where its interpretation causes a more

14 The clear and present danger test is also considered a content-based restriction in the freedom of expression handbooks. *Cf. e.g.* Geoffrey R. Stone *et al., The First Amendment (Fifth Edition)*, Wolters Kluwer, New York, 2016.

15 John Hart Ely, 'Flag Desecration: The Case Study of Categorization and Balancing in the First Amendment Analysis', *Harvard Law Review*, Vol. 88, Issue 7, 1975, pp. 1495-1498.

16 Laurence H. Tribe, *American Constitutional Law*, The Foundation Press, Mineola, NY, 1978, § 12-2, § 12-3, § 12-20; Stone 1983-1984.

serious headache. Nevertheless, we can find two important decisions, which for us are now sufficient examples of restrictions that do not refer to content at all.

Decision No. 75/2008. (V. 29.) AB examined the law of assembly that required prior notification of public gatherings, allowing the police to prohibit the event if it would seriously jeopardize the smooth functioning of representative bodies or courts, or disproportionately compromise the order of traffic.[17] Confirming a previous decision of the bench,[18] it found that this form of notification obligation – as a necessary solution for the police in order to perform public order related tasks – is not unconstitutional. According to the central rationale of the reasoning, the statutory system mandating prior notice of assemblies is based on content neutrality, and considerations of the content of the expression presented at the event may not be taken into account by the authorities.[19] Given the fact that the reference to the functioning of both the representative bodies or the courts and the order of traffic completely lack aspects of the content or impact of expressions to be articulated at the assembly, the restriction in question is a clear example of an external boundary independent of content. The Constitutional Court has subsequently remained consistent with the interpretation of the law on the passages of the Act on Assembly, and in Decision No. 14/2016. (VII. 18.) AB, in terms of the merits of the case, annulled the court decision extending the grounds for a preliminary prohibition.

Although the reasoning of the constitutional justices in our other example did not touch upon the issue of content neutrality, we may still reveal interesting aspects from the case decided in Decision No. 3208/2013. (XI. 18.) AB. The regulation challenged by the petitioners amended the rules on the placement of public billboards, allegedly aiming to improve road safety. In this amendment[20] we typically find provisions that restrict this channel of communication, irrespective of the content of the message placed on the advertising media: the legislator *(i)* explicitly forbids the placement of advertisements on the road's structures, accessories, public lighting, electricity and telephone columns, and *(ii)* the exceptions for sections outside residential areas have been reduced: earlier it was possible to place, beyond a certain distance from the road, any advertising sign; after the amendment that exemption applied only to advertising boards not exceeding 4 m^2. The Constitutional Court's decision identified the amendment as a rule only affecting commercial advertisements. With this assessment the Constitutional Court failed to put the case into the correct constitutional context: the legislation in question reduced the room for communication to a wider extent than for commercial ads, thereby also affecting electoral campaigning. However, if we look at the case with this correction, we can identify one of

17 Former Act III of 1989 on the right to assembly (was in force till 2018, replaced by Act LV of 2018), Sections 6(8) and 8(1).

18 Decision No. 55/2001. (XI. 29.) AB, ABH 2001, 442.

19 Decision No. 75/2008. (V. 29.) AB, Reasoning IV.5.2., ABH 2008, 651, 667.

20 Act CLXXII of 2010 on Amendments to Certain Traffic Laws.

the newest content-neutral restrictions in the regulations examined in recent years, irrespective of the messages conveyed.

24.4 The Content and the Manner of Speech

Owing to its special character and significance, it is worth discussing a typical attempt of the Hungarian legal practice to consider certain restrictions of speech as content-neutral on the basis that they only refer to the form and manner of expression. Of course, it is not just a domestic invention to distinguish, and evaluate less strictly, restrictions on the manner of expression. Indeed, in the US Supreme Court, for example, since the 1940s,[21] there has been the category of time, place and manner standards as the main category of content-neutral limits. However, in the practice of the Constitutional Court, this attempt has led to extremely confusing results.

Restrictions on the manner and form of speech in a narrower range, where they are presented without reference to the content of communication, may indeed be distinguished from content-based interventions.[22] In this context, the manner of expression is interpreted as a means, channel, and medium of communication. Such restrictions include the above-mentioned cases of content-independent intervention, rules concerning the traffic-dependent location of assemblies, or the physical carriers of public messages (billboards), where clear boundaries can be drawn between different ways of expressions by means of communication platforms (such as street speakers *v.* national television channels). By way of further examples, this may include quiet laws in residential areas or provisions that enforce cleanliness of public spaces. Also, the Constitutional Court did not apply the strictest test to an otherwise public discourse, because the punishment for spraying private property "touched only on the appearance of communication alone in the outside world".[23]

However, the Hungarian practice typically calls for a distinctive aspect of 'manner', actually referring to the style and phrasing of communication. Decision No. 33/1998. (VI. 25.) AB examined the provision of the organizational and operating rules of the Local Government of the Municipality of Debrecen, according to which the General Assembly may impose a fine on its member who uses a term that is offensive to others or unworthy

21 *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940), *Cox v. New Hampshire*, 312 U.S. 569, 575 (1941).

22 In the US practice, the *Clark v. Community for Creative Non-Violence* case has outlined the test used until today, according to which, in order for a restriction to be included in this circle, it is first and foremost necessary to be justifiable without reference to the content. 468 U.S. 288, 293 (1984).

23 Decision No. 3132/2018. (IV. 19.) AB, Reasoning [32]. However, the statement of reasons for the decision emphasizes that the form in which the communication is published may not be limited by the fact that other means of communication were available (Reasoning [40]). It should be noted that examinations concerning the external appearance of the communication can easily lead us to the question of the scope of freedom of expression.

of the body. The Constitutional Court stated as a basis for its decision that a clear distinction should be made between the freedom of expression and the form of expression. While freedom of expression enjoys enhanced constitutional protection, the General Assembly, as an autonomous community, has the right to make restrictive provisions on how an opinion is presented, in order to guarantee the smooth functioning of the body. According to the Constitutional Court, the exclusion of expressions that are offensive to others or unworthy of the body is to ensure smooth operation.[24] Perceiving the difficulty of demarcation itself, the Constitutional Court added that although its decision was based on the separation of the right to expression and the form and manner in which that right is exercised, it does not mean that there is no relationship between the two: "In an extreme case, the manner in which the opinion is expressed may have a direct effect on the exercise of the human right to expression". If the local bylaw "keeps the manner of expression unreasonably strict", it would directly hinder the exercise of the right to freedom of expression.[25]

The same reasoning was used by the Constitutional Court in reviewing the disciplinary rules of the Parliament. Decisions No. 3206/2013. (XI. 18.) AB and No. 3207/2013. (XI. 18.) AB have examined the provisions of the House Rules, which foresee disciplinary measures for both committee meetings and the Plenary Session, if the speaking MP uses a term that is strikingly offensive to the prestige of the Parliament. The Constitutional Court confirmed what was explained 15 years earlier, stating that it is a limitation of the external representation and the manner of expression, in which the House Rules set the boundaries for ensuring the proper functioning of the body.[26]

It is worth mentioning that the reasoning of the Constitutional Court uses the term 'manner of expression' in the meaning of the relevant case-law of the ECtHR. The Strasbourg Court attributed importance to similar arguments in its blasphemy-related case-law. According to the thesis in the *Otto-Preminger-Institut v. Austria* judgment, although religious people are obliged to tolerate criticism and competing worldviews, the manner in which religious beliefs are opposed may raise the responsibility of the state to guarantee the right to peaceful enjoyment of the freedom of religion.[27]

The Constitutional Court (and the ECtHR) in essence argues that any content related to the political debate (critical or hostile to religions) may be expressed if it is uttered in a fair, non-controversial style, suitable for a dispute. However, we must see that this argument, which seeks to consider restrictions on the 'manner' of expression as content-neutral, confuses the evaluation of content-based and non-content elements. In these judgments,

24 The Constitutional Court annulled the qualifier "unfounded", since it perceived it as exaggerated.

25 Decision No. 33/1998. (VI. 25.) AB, Reasoning III.3., ABH 1998, 256, 261.

26 Decision No. 3206/2013. (XI. 18.) AB, Reasoning [24]-[26], and Decision No. 3207/2013. (XI. 18.) AB, Reasoning [22]-[24].

27 *Otto-Preminger-Institut v. Austria*, No. 13470/87, 20 September 1994, para. 49.

the Constitutional Court bases its assessment on non-existent distinctions. While the manner of expression as a means, channel, and medium of communication can be separated from the content of speech, the same cannot be said if it is understood as the style and phrasing of communication. The reasoning of the Constitutional Court takes the view that the content and the style of expression may be separated. It believes that if we limit only the form, the manner of expression, then the content may remain intact. Emphasizing the distinction between content and style presupposes that all statements may be expressed in an offensive or non-offensive manner without any substantive change of meaning. However, this cannot be generalized; in fact, typically the content of the opinion and the style of the expression are closely intertwined, and together form the expression of the opinion itself. Although the analogy is somewhat limp, it can be said that it is also difficult to defend artistic freedom claiming that everyone should be free to compose, but only the way that Mozart or Bartók did, because the rest would hurt our ears. A wide range of expressions are not harsh or even outrageous in order to insult others, but to express the views of the speaker in tune with his mood. The style of communication cannot be interpreted as anything other than the product of cultural patterns reflecting content, so their separation cannot be defended in logical terms.[28]

These examples support our doubts more than anything else: what else could be the content of the expression, if not the use of 'offensive, unworthy, inappropriate terms'? An in-depth examination of content-based restrictions cannot be avoided by attempting to pass off the regulation of style and phrasing as a content-neutral standard.

All in all, we can definitely state that the method based on the distinction between expression and its manner is not suited to justify the relevant aspects of free speech assessment, and, in particular, leads to a false result when referred to as a substantive element of content neutrality.

24.5 External Boundaries Not Independent of the Content

As mentioned earlier, content neutrality in the Hungarian jurisprudence, *i.e.* the concept of the external boundary, at the time of its conception, actually referred to restrictions not fully independent of the content of communication. Decision No. 30/1992. (V. 26.) AB identified a constitutional external boundary for incitement to hatred, but at the same time, as the majority view in the free speech literature shows, the clear and present danger-type tests are the most widely accepted examples of content-based limitations. These formulae obviously do not function independently of the content of the communication,

28 Robert C. Post, 'Cultural Heterogenity and Law: Pornography, Blasphemy, and the First Amendment', *California Law Review*, Vol. 76, Issue 2, 1988, p. 309.

because it is their very essence to examine the effect they cause, and the effect of a communicative act may not be evaluated regardless of the content of the communication. For example, in the case of the Hungarian standard of incitement, an aspect of content is that the extremist speech in question must have an impact on emotions. An expression of opinion influencing emotions – as opposed to persuading the mind – means appealing to instincts and emotions. Its mobilizing power is generally more serious and dangerous for people than the speech that tries to influence other people's thinking with a series of even demagogic arguments, obviously also having an emotional side-effect. Incitement directly stimulates visceral feelings and is therefore an emotional anteroom for violence. While this approach is clearly supportive to freedom of expression, since it is intended to narrow down the scope of intervention, it is undoubtedly of a content-based nature.

Initially, the analysis of incitement to hatred still harbored the opportunity for an interpretation that made the 'external' nature of the boundary visible. A standard focusing on the dangerous consequences of incitement inevitably draws attention to the specific external factors of the individual communicative situation. In addition to some of the content-components of the speech, the main emphasis of legal assessment is on the actual risks that can be identified where and when the speech is made. It can be said that separation from the content is facilitated by the fact that, in these cases, the harmfulness of the speech lies in the externally manifested consequences. The test of incitement therefore does not turn on the value or extremity of the communication in question, but on the actual dangerous circumstances of the speech. Interestingly, this relationship is most aptly described in Decision No. 165/2011. (XII. 21.) AB, which, by the way, as a decision examining media law provisions, typically uses standards that follow another logic. In one part of the reasoning, summarizing its practice on free speech and press freedom, the Constitutional Court concludes that the restriction of the freedom of the press primarily focuses on the intended effect rather than the content of the words.[29]

However, this initial interpretation was not followed by later practice, and the concept of the external boundary was also applied to an area that expanded beyond the manifest dangerous consequences of speech. The roots of this latter direction, by the way, can be traced in Decision No. 30/1992. (V. 26.) AB itself, which, while arguing for the unconstitutionality of group defamation, sees the absence of an external boundary in that it is not possible, or at least extremely uncertain, to identify the violation of another right – contrary to incitement where individual rights are threatened.[30] Following this, one of the striking lines of relying on an external boundary has been to conceive of such rights within the protection of the personality. According to the reasoning in Decision No. 36/1994. (VI. 24.) AB relating to the possibility of criticizing public figures, although freedom of

29 Decision No. 165/2011. (XII. 21.) AB, Reasoning V.2., ABH 2011, 478, 524.
30 Decision No. 30/1992. (V. 26.) AB, Reasoning V.3., ABH 1992, 167, 179.

expression extends to value judgements independently of the content (value, veracity, rationality) of the opinion, human dignity and reputation may be an external boundary even to value judgments.[31] It is a separate issue that personality protection tests are different in the public debate and beyond – but they function as an external boundary to freedom of opinion.

Later on, domestic case-law further widened the concept of external boundaries. It is not just the case that, over the years, decisions have been made that adopted rules which increasingly respond to 'intrinsic harms' instead of external consequences,[32] but also the Constitutional Court has adapted the formula itself to these interpretations. Decisions No. 3206/2013. (XI.18.) AB and No. 3207/2013. (XI. 18.) AB, following the logic and key words of Decision No. 33/1998. (VI. 25.) AB, rely on the external boundary understood in a wider sense, extending the protection, in addition to the protection of human dignity and good reputation, to the dignity of the Hungarian nation, and national, ethnic, racial and religious communities.[33] Decision No. 14/2016. (VII. 18.) AB, by making an important clarification of the term 'dignity of the communities', captures the external boundary of incitement to hatred, but at the same time refers to the protection of constitutional fundamental values. According to its reasoning, the issue to be considered on a case-by-case basis is whether the assembly performs a hate speech or whether it is against "the democratic rule of law, *i.e.* the existing constitutional order, the fundamental values of state organization".[34] It is noteworthy that, in the latter issue, the Constitutional Court also relies on the interpretation given by the ECtHR. Namely, on the basis of the prohibition of the abuse of rights, freedom of expression may not be invoked by those whose purpose is the introduction of a dictatorship and the abolition of the rights guaranteed by the Convention.

Based on the above, we can definitely draw a clear conclusion: the category ('external boundary') that can be used not only for the protection of personal rights but against communications contrary to the dignity of communities or constitutional values cannot be a suitable methods for separating content-based and content-neutral restrictions. The test of the external boundary, which has never been free from the evaluation of certain substantive elements of speech in domestic case-law, has become an overarching concept of the restriction of content. We have to ask the question: should we abandon this approach completely? Is content neutrality meaningless in the Hungarian concept of free speech? In the following, I argue that the answer is 'no' to both questions; moreover, and interestingly enough, the serious internal contradictions in the concept of the external boundary

31 Decision No. 36/1994. (VI. 24.) AB, Reasoning III.2., ABH 1994, 219, 230.

32 Robert C. Post, 'Blasphemy, the First Amendment and the Concept of Intrinsic Harm', *Tel Aviv University Studies in Law*, Vol. 8, 1988, pp. 293-325.

33 Decision No. 3206/2013. (XI. 18.) AB, Reasoning [24]-[25], and Decision No. 3207/2013. (XI. 18.) AB, Reasoning [23].

34 Decision No. 14/2016. (VII. 18.) AB, Reasoning [38]-[40] and [44].

may in some way help us explain the more complex reality. We can thus say that the appeal for content neutrality makes the most important aspects of the content-related analysis unavoidable, at the same time, we are not (nor have we ever been) locked into these aspects, which in turn can increase our sensitivity to further relevant circumstances.

24.6 Clarifying the Relevant Theses of Content Neutrality in Hungarian Law

Our investigation into the external boundary as a special, central category of restrictions on free speech revealed that the practice has, over time, put restrictions for the rights of others, for the dignity of certain communities, and for the protection of fundamental constitutional values in its conceptual framework. In the face of the breadth of these categories, one could not only conclude that the external boundary is not a precise test for separating content-based and content-neutral restrictions, but even that it lacks any serious aspects of content neutrality. I argue that this is not the case and that crucial considerations of the principle have not collapsed under the weight of the contradictions inherent in the 'external boundary' concept. At the same time, however, we need to clarify at what point it is worth going beyond the strict content test. In what follows, I will summarize those considerations laid down in the abovementioned decisions that may be understood as the valid theses of content neutrality in the Hungarian doctrine.

First of all, we have to start by saying that the above challenges to the protection of free speech in no way undermine the strength of the theorem that the scope of free speech covers all communication within the public dialogue, irrespective of their content.[35] The issue of inclusion in the scope cannot be made dependent on the content elements of the specific speech. Any speech that is part of the public dialogue is subject to freedom of expression, and its constitutional significance is ensured in this light. It is precisely declared in the reasoning of Decision No. 30/1992. (V. 26.) AB that freedom of expression does not *relate* to its content.[36] The concurring reasoning to a later decision attempted to resolve the contradictions of the content neutrality by stating that content neutrality is meant only for determining the scope of fundamental right situations and not for assessing the constitutionality of the restriction.[37] Although we see important considerations for further constitutional adjudication as well, there is no doubt that the idea of content neutrality must

35 For the distinction between scope and protection, *see* Frederick Schauer, 'Categories and the First Amendment: A Play in Three Acts', *Vanderbilt Law Review*, Vol. 34, 1981, p. 265; Eric Barendt, *Freedom of Speech*, Oxford University Press, 2005, pp. 74-78; Robert C. Post, 'Participatory Democracy as a Theory of Free Speech', *Virginia Law Review*, Vol. 97, Issue 3, 2011, p. 477.

36 Decision No. 30/1992. (V. 26.) AB, Reasoning V.3., ABH 1992, 167, 179.

37 Decision No. 4/2013. (II. 21.) AB, concurring opinion by András Bragyova, [83].

prevail most consistently with regard to the scope of freedom of expression. The Hungarian doctrine in this respect is strongly opposed to the previously analyzed Decision No. 3206/2013. (XI. 18.) AB, which addressed the issue of the use of expressions that violate social groups by simply excluding them *ab ovo* from the protection of the fundamental right of expression. Hate speech offensive to communities, in the broader sense, is subject to freedom of expression, with all its manifestations. Indeed, the scope does not depend on anything else than the type of communication to which it belongs is undoubtedly linked to the constitutional values of freedom of expression. Political speech affecting social groups is always linked to public discourse, and it is always meant to shape public opinion.

Second, and closely connected to this, but already focusing on the protection (not the scope) of free speech, we can state that the Hungarian practice, by elaborating the concept of 'external boundary', maintains the approach that seeks justification for restrictions not in the content itself, but in the context of communication. This statement is perfectly substantiated by the fact that the domestic doctrine does not adopt the strict position of content neutrality, and formulates a valid message: although the provisions restricting speech do not fail the test of constitutionality simply because they evaluate content elements, they must be rooted in additional circumstances of the communication in order to stay alive (in force). Restrictions on free speech should not in themselves refer to the worthlessness, inaccuracy or inadmissibility of the content of expression. Although majority opinions of the Constitutional Court have never made this clarification sufficiently clear, two judges have drawn the above conclusion. According to one of them, there is no opinion that, irrespective of its context, could be restricted purely on the basis of its content – the constitutionality of the restriction of rights depends in any case on the circumstances as a whole.[38] The other one points out that "somewhere, someday, irrespective of its content, every opinion must be capable of being expressed – even if the place, manner, time *etc.* may be restricted."[39]

This logic is reflected, for example, in the regulation of audiovisual media content. Using the most vivid example: while the Constitutional Court has consistently prevented the general punishment of group defamation, it has already considered the media authority's pursuit of the same content constitutional. Decision No. 1006/B/2001. AB accepted as a legitimate objective the prevention of "the radio and the television being the amplifier of those pursuing hatred that is offensive, racially motivated, hateful and call for discrimination". In this case, the Court relied on the media law argument as a circumstance beyond content, that

38 Decision No. 14/2000. (V. 12.) AB, dissenting opinion by István Kukorelli, ABH 2000, 108.

39 Decision No. 4/2013. (II. 21.) AB, concurring opinion by András Bragyova, Reasoning [83] (emphasis in the original).

> "the opinion-forming effect of radio and television broadcasting and the convincing power of motion picture, sounds, and live reports have many times the impact on thought as other information society services".[40]

However, the special regulation of audiovisual media is just one of the most comprehensive examples of the contextual approach, and its significance extends to the full scope of free speech. From this point of view, the Constitutional Court has missed the opportunity for clarification when in Decision No. 4/2013. (II. 21.) AB on the criminal law provision prohibiting the use of symbols of authoritarian systems it failed to explain aspects relevant to the freedom of opinion. Had it done so; it could have pushed the legislator more vigorously to prosecute only those situations where there is a conscious weakening of fundamental democratic values.

Third, keeping the external boundary principle in the doctrine also warns us not to confuse two very different issues: On the one hand, that, the Hungarian practice had, in exceptional cases, considered the view expressed, too, when setting the limits. On the other hand, the most important requirement of content neutrality, the prohibition of state intervention in selecting viewpoints, is still one of the guiding principles of domestic doctrine. The thesis of protecting opinions irrespective of their value or veracity makes this clear, and this thesis has not lost its validity due to the narrow exception made in practice for the protection of fundamental constitutional values. With the help of the relevant literature, we can try to resolve this contradiction. We have seen that the key notion of the Hungarian concept, the category of external boundaries, does not distinguish between restrictions referring to content and those that are completely independent of content. Considering this, it can be said that the domestic doctrine displays a concept of content neutrality which does not primarily focus on the risk of taking content into account *per se*, but on other threats. The Hungarian practice may be explained quite well if we join the line of theoretical discourse according to which the focus of the constitutional assessment should not be so much on the issue of content, but rather on the motivation of the intervening state.[41]

Hence, fourth, the guiding principle regarding content neutrality in Hungarian practice may be to focus our attention above all on the motivation for limiting freedom of expres-

40 Decision No. 1006/B/2001. AB, Reasoning III.5.2., ABH 2007, 1366, 1374.

41 Frederick Schauer, 'Cuban Cigars, Cuban Books, and the Problem of Incidental Restrictions on Communications', *William and Mary Law Review*, Vol. 26, Issue 5, 1984-1985, p. 780; Ashutosh Bhagwat, 'Purpose Scrutiny in Constitutional Analysis', *California Law Review*, Vol. 85, Issue 2, 1997, p. 297; Barry P. McDonald, 'Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression', *Notre Dame Law Review*, Vol. 81, Issue 4, 2005-2006, pp. 1352-1353.

sion.[42] It is not decisive in itself whether legislative intervention affects the content or the message of communication, but whether the reasons behind the intervention are constitutionally permissible or not.[43] An advanced doctrine of free speech inevitably demands this more complex approach.[44] On the one hand, it is true that content restrictions often suggest that the intention of the state is to distort democratic public discourse; on the other hand, it is plausible that in a few narrowly tailored cases supported by political consensus, protecting the most fundamental of constitutional values is justified. If we look at the most challenging decisions, such as the desecration of national symbols, the use of totalitarian symbols, or even the denial of crimes committed by the nazi or communist regime, it is comprehensible why these restrictions have been approved. However, in the absence of such extraordinary circumstances, the government's unjustifiable intention to distort or restrict public discourse rears its head.

This is palpable in Decision No. 1/2013. (I. 7.) AB, which examined, *inter alia*, the constitutionality of the rule that allowed only the public service media to publish political ads during the campaign period. Considering that the provision would have eliminated one of the most important tools of political communication to the widest audience, the Constitutional Court carefully examined the purposes that such an amendment could serve and, after considering all the circumstances of the case, ruled out the arguments that sought to justify this intervention.[45] For example, in the context of the campaign silence for the undisturbed expression of the electorate's will, the Court considered that the law in question was about to eliminate the institution of campaign silence. In this respect, the case of the legislator was radically weakened. It is just as voluble where the reasoning rejects the argument that the restriction serves to keep campaign costs under control, serving the purity of the elections. According to the Constitutional Court, this could not motivate the legislator in the case, as it did not regulate the cost-reducing use of other campaign tools, nor did it foresee any new regulations for the total cost of the campaign. After excluding these reasons, the chances of the government's motivation for other, hidden, indefensible restrictions to the freedom of expression radically increases. This played an important role for establishing the unconstitutionality of the rule under review. The suspicion of the presence of an indefensible motivation in this case is also reinforced by the aspect that we can add to the question, as compared to the reasoning of the Constitutional Court's decision:

42 Understanding the motivational aspects under the Hungarian fundamental rights dogma, through examining the legislative objectives (the legitimate aim in the Strasbourg terminology) is definitely an element of constitutional review.

43 Robert C. Post, 'Viewpoint Discrimination and Commercial Speech', *Loyola of Los Angeles Law Review*, Vol. 41, 2007-2008, pp. 173-174.

44 Robert C. Post, 'Recuperating First Amendment Doctrine', *Stanford Law Review*, Vol. 47, 1994-1995, p. 1249.

45 Despite the fact that the European approach gives much more room for setting the legal framework for campaigning than the US constitutional practice.

the examined regulation, although it covers all political advertising, cannot be considered as fully neutral, at least if the term is used in its broader sense as developed in literature. According to this, arguments against viewpoint-based restrictions may be used to some extent, even if a seemingly neutral rule actually distorts publicity to a disproportionate extent, *i.e.* certain viewpoints or certain speakers are clearly disadvantaged. I am convinced that, in the case of any regulation of political advertising, there are serious arguments to be made, that this is the case. The voice of the acting government necessarily resounds louder in the political discourse given a non-hostile media environment, which in addition may be exploited particularly effectively with conscious government action and communication during the campaign period. In such an environment, the political opposition seeking to replace the government is in greater need of sending messages to the electorate through paid political advertisements.[46] A radical reduction or even loss of this opportunity therefore affects its campaign communication capabilities more severely than that of the government, which plays the main role in everyday communication. And since the justifiable motivations have already collapsed, there is a great chance for the emergence of an unjustifiable one: the radical reduction of the possibility of political advertising is actually a measure to prevent the effectiveness of opposition campaigns.

Finally, fifth, and one of the most important conclusions of our excursion into content neutrality: if we place the motivation rather than the content of the restriction into focus, we can avoid the dichotomy implied in the content-based/content-neutral analysis. Instead, we can conduct a rigorous freedom of expression assessment beyond that dichotomy. To examine motivation, content neutrality may be an important pillar, but it should never become the exclusive method. In other words, a seemingly perfectly neutral regulation must be judged by the strictest standards if the state's intention to silence others is suggested by the circumstances.

The previous example of restricting political advertising has already brought these aspects to light, but it is even more interesting to identify them in a case that we have previously mentioned as an example of intrinsically independent intervention. The regulation examined in Decision No. 3208/2013. (XI. 18.) AB amended the requirements for the placement of public billboards allegedly in order to improve road safety. As mentioned above, these are typically provisioning that narrow this channel of communication, irrespective of the message placed on the advertising media (for example, the ban on advertising placement on a pylon or restricting the placement of bulletin boards of a certain size). The Constitutional Court considered the narrowing of advertising opportunities to be mere

46 It is an advanced approach to content neutrality to evaluate whether a given regulation affects the flow of thoughts equally, or if it may disrupt the spread of certain views disproportionately. Susan H. Williams, 'Content Discrimination and the First Amendment', *University of Pennsylvania Law Review*, Vol. 139, 1990-1991, p. 658.

advertising restrictions and therefore, constitutional in view of the fact that improving the safety of road traffic (in view of the protection of life and property) is a legitimate reason for restricting the freedom of commercial expression. Moreover, the legislator had found a proportionate solution when it banned advertising boards, most likely to distract drivers.[47] However, first, this regulation did not only concern commercial communications, and second, there could have been legitimate doubts about the legislator's motivation. Such doubts also arose in the minority of justices. According to the dissenting opinion, the constitutional purpose of the restriction may not be established, for taking all circumstances into account, the legislator could not have been guided by the intention of increasing road safety. The argument seeks to refute in detail any assumption of the legislator's justifiable motivation. First, it points out that, under the Act, even before the amendment under review, it was only possible to place any billboard, typically with an official license, that did not jeopardize traffic safety, and that non-compliant boards could be removed. Second, if the legislator had actually sought to increase safety by eliminating circumstances that distract drivers, such as reducing the number of visual information sources within the driver's field of vision, this should have been done for all visual information of the same type. However, while no advertisement may be placed on lampposts, they can indeed be placed on advertising columns placed near the roadside, at the drivers' eye level, which are even more in their field of vision. If it is true that billboards placed along public roads are distracting for drivers then this is true of all advertising signs and other visible formations within the traffic participants' field of vision, without discrimination. In contrast, the amendment banned the placement of certain billboards and did not restrict any other advertising in or even more in the driver's field of vision, and did not prohibit advertisements placed on buses, trolleybuses or taxis moving on the road, even though, according to common sense, due to their mobile nature and because of their placement, these may be even more confusing than the newly banned advertisements alongside the road. An additional argument against the credibility of the motivation to improve road safety is that the change allows the placement of some smaller billboards that are harder to see and can only be read for a shorter period of time. Meanwhile, the larger ones were no longer permitted, even though they are easier to read and as such are less distracting.[48]

Agreeing with the above arguments, we can say that in this case the presumption of a legislative intent to improve road safety has been refuted. As far as our study of freedom of expression is concerned, this means that the amendment in question has restricted democratic public discourse to a much wider extent than advertisements, such as election

47 Decision No. 3208/2013. (XI. 18.) AB, Reasoning [107].

48 András Bragyova's dissenting opinion, to which four other judges (László Kiss, Péter Kovács, Miklós Lévay and Péter Paczolay) joined, [128]-[140].

posters, without any reasonable justification, alongside other motivations that are either irrelevant or inexcusable from the perspective of the freedom of opinion.

We can clearly declare that this change of approach, which evolved from the principle of content neutrality, not only proves necessary, but also promises extraordinary benefits for the enforcement of constitutional requirements. In the area of freedom of expression and press freedom, it is less common these days to encounter textbook-type content-based restrictions, and the regulator more frequently attempts to influence the medium and structure of communication. It is crucial that this not be allowed without constitutionally justifiable grounds – even if the legislators are well prepared with justifications that seem to fair and acceptable on their face.

24.7 Conclusions

The inconsistency of the 'external boundary' doctrine does not erase the significance of content-based scrutiny. Besides relevant elements of content-based scrutiny, however, it should be clarified how to transcend it. The relevant theses of content neutrality in the Hungarian doctrine are the following: *(i)* Communication belonging to public social interaction is covered by freedom of speech irrespective of its content. The scope of free speech is independent of the content of speech in question. *(ii)* Restriction of speech should be justified not by referring to its content alone but by the context of the expression. Restrictions should not be based on the fact that the content of speech is unacceptable, unworthy or wrong. *(iii)* Viewpoint neutrality is a central requirement in Hungarian case-law. *(iv)* The Hungarian doctrine of content neutrality does not focus on the risk raised by a content-based rule alone but rather on other dangers: it drives our attention foremost to the motivation behind speech restrictions. *(v)* It is not decisive in itself if the regulation affects the content or message of the speech. The more important question is whether the reasons for the regulation are constitutionally justifiable or not. *(vi)* The government's intention to restrict or distort public discussion can be revealed with appropriate scrutiny. *(vii)* Stringent constitutional examination should not be confined by the content-based/content-neutral dichotomy: seemingly completely content-neutral regulations should be assessed with the most rigorous standards if the government's improper motivation is identified. *(viii)* The approach transcending the dichotomy of content-centered analyses is more suitable for new regulations on speech: legislators more and more often try to influence not the content but the structure of public communication. It is crucial that they should be allowed to do so only on justifiable grounds.