Rallying under a Nazi Swastika Flag

Is it a Criminal Act?

Kimmo Nuotio

24.04.2024 doi: 10.59704/3a03860ac166bed1

On April 5th, 2024, the Helsinki Court of Appeal held that rallying under a Nazi swastika flag constituted an offense of incitement to hatred, namely agitation against a population group. The official swastika flag of Hitler's national-socialist regime is one of the most widely known and frightening symbols of that time. It is a highly condensed symbol which gets its meaning today from the fact that under this and other Nazi signs millions of Jews, Roma people, disabled, and other minorities were persecuted and destroyed.

Contrary to German law, Finnish law does not include any specific prohibition of symbols of this kind. It therefore leaves it open under which circumstances the public use of symbols such as those linked with the Nazi regime in fact constitute a criminal offense. Against this background, the Court of Appeal's conclusion is to be welcomed. Had the outcome been different, this would have triggered a set of difficult questions of how to amend the regulatory framework in order to address this issue. The judgment may, however, still be appealed.

The Background

In 2018, the nationalist extreme right announced and organized a rally under the name "Towards Freedom!" in the city center of Helsinki on the Finnish day of independence. A few hundred participants had joined the call. The key organizers were linked to the Nordic Resistance Front which was then also active in the other Nordic countries. The group promotes racist and fascist agendas such as collecting state powers in the hands of Nordic white men, suppressing refugees and other minorities and denying them foundational liberal constitutional values such as the human dignity and equal value of every citizen and human being.

Prior to the event, the Central Police Administration had petitioned the court to ban the group on the grounds that the goals of the Nordic Resistance Front were not only unlawful but also immoral. At the time of the rally, the decision to ban the group was not yet final because it had been appealed to the Supreme Court. The Supreme Court later confirmed the group's ban by introducing a doctrine of abuse of right into Finnish case law: as the aims and methods of the Front were in breach of the foundational principles of the Finnish Constitution, the rights to association and freedom of speech could not justify its activities but were rather regarded as abuse of those rights (The Finnish Supreme Court 2020:68).

During a relatively peaceful rally, three Nazi flags were portrayed in the front row. The police quickly made the decision to intervene and ordered the flags to be removed. After some resistance the police got hold of the flags. An investigation ensued against several persons on account of agitation against a population group (Finnish Penal Code Chapter 11 Section 10) and obstructing a public official (FPC Chapter 16, Section 3). The prosecutor put forward charges against five persons with slightly differing act descriptions. The crucial issue was whether the definition of the crime of agitation applied. The key element of the crime is the dissemination among the public of a message whereby a certain group is "threatened, defamed or insulted on the basis of its race, colour, birth, national or ethnic origin, religion or belief, sexual orientation or disability or on another comparable basis".

The First Instance Decision

To the surprise of many, the first instance Helsinki Court decided not to convict any of the individuals. It

reasoned that a conviction for agitation against a population group would have required an extensive application of the offense description in question. According to the Court, the Nazi flag was not prohibited as such, and there had been no verbal expression of what was meant by the use of those flags. However, the message conveyed by the flag itself was threatening, insulting and hateful against certain groups of people. In particular, the rally was directed against immigrants. The Court held that historical Nazi ideology could not ground criminal liability in such a context. While the use of Nazi flags was a provocation, it could not under the circumstances be held to amount to a criminal act. The criminal law principle of *nullum crimen sine lege* prohibited the application of the provision to the set of facts at hand as the persecutions carried out during the Nazi regime were distant in time and place from Finland in 2018. The Court also referred somewhat obscurely to the principle of margin of appreciation stating that the Nazis had not directed massive human rights violations against the Finns.

The decision was a surprise. After all, public rallying under Nazi symbols shows a willingness to promote their political goals. The reasoning that the specific Finnish history could lead to a wider acceptability of such activities than elsewhere in Europe was shocking and could have meant a certain relativization of values precisely at the very heart of hate speech law. Rallying under Nazi symbols arguably amounts to a paradigmatic example of agitation to hatred, especially as it substantially resembled the use of these symbols during the Nazi regime. Indeed, by way of comparison, the Swedish Supreme Court ruled back in 1996 (NJA 1996 p. 577) that the use of a Nazi uniform in a public place amounted to agitation to hatred. The Swedish Court clearly did not consider it problematic to use the domestic provision on agitation against a population group to convict for even such a low-profile use of a Nazi symbol. Unfortunately, in Finland no similar precedent exists. However, given that the wording of the Swedish penal law provision (Brottsbalk, Chapter 18 Section 8.1) is substantially similar to the Finnish one, it is surprising that the Finnish first instance court took quite another road.

The prosecutors appealed the decision, claiming that the first instance court had required too much for securing a conviction. No additional requirement beyond simple using the flags should have been set, and a conviction would not have breached the legality principle. What is more, even though the accused had acted in their capacity as individuals, their links to the Nordic Resistance Front were obvious and should have been taken into account. One of the accused who had been involved in the decision to use the flags was the head of the Finnish section of the Nordic Resistance Front. As such, far from being a rally of random individuals, the rally constituted an organized activity of a well-known Neo-Nazi group.

The Appeals Court Decision

In its judgment on April 5th, 2024, the Helsinki Court of Appeal distanced itself from the reasoning of the first instance court. All five accused were convicted for a hate crime of agitation against a population group. The Court refuted the view that the Nazi regime and its world view could be regarded as a merely historical and context-bound ideology of hatred against Jews. Its propagation clearly trivialized the Holocaust. By invoking the criminal law's principle of legality, the Court reasoned that the symbolics of the flag and its underlying ideology needed to be given a broader meaning. In particular, the crime of agitation to hatred had to be seen as forming part of the wider efforts to take measures against hate crime which are rooted in an opposition to the historical experience of Nazism. The idea was to never again let such an abuse of power happen.

The Appeals Court emphasized that in the individual case the context in which the Nazi flag was being used had to be taken into account. It refuted the historical relativization road that the First Instance Court had gone down. The Appeals Court recognized that the use of Nazi flags while rallying carries a specific connotation of energy, power and commitment which signals a threat. The rally also included protests against immigration policies and migrants, a message

that was in fact explicitly verbally formulated by the demonstrators.

The Appeals Court also stressed the links the accused had to the Nordic Resistance Front. One of the accused was the head figure of the movement and had been involved in the decision to use the flags. This mattered for the purpose of interpreting the meaning of the gesture to raise those flags. Given the political goals of Nordic Resistance Front, the decision to use the flags had to interpreted as an attempt to amplify the group's message. This was so even though the people rallying certainly consisted of a host of far right groupings. Thus, the Appeals Court read the situation differently from the first instance court. It was aware of the broader historical context of Nazi ideology, but it built a comprehensive view on why and what was normatively prescribed and it avoided the too detailed analysis that took the first instance court off the mark.

Next Steps

The judgment of the Appeals Court is not yet final. If the convicted petition the Supreme Court to grant a permit for an appeal, the case may still be pending for a year or two. However, if the Appeals Court's judgment stays final or if the Supreme Court agrees with its reasoning, clarity has been won in the matter at hands. In the unlikely event that the decision is overturned, it raises questions concerning the compatibility of Finnish law with European human rights law.

Back in 2021, the EU Commission had notified Finland (as well as Sweden and some other Member States) that it ought to revise its provisions concerning the crime of agitation against a population group and introduce a provision criminalizing Holocaust denial. It requested specifically that hate speech should be rendered punishable even when targeting an individual person. What is more, one could argue that the duty to criminalize denial and trivialization of the Holocaust which is incumbent on Member States under Article 1 of the EU Framework Decision combating certain forms and expressions of racism and xenophobia from 2008 includes a duty to criminalize rallying under a Nazi flag. I believe that applying a general penal provision such as the one on agitation is in fact to a better option than trying to regulate and prohibit the use of specific symbols. Listing and labelling certain symbols as prohibited risks leading to overinclusive outcomes. In terms of criminal law principles, the approach adopted by the Appeals Court to assess the particular use of the given symbol seems wiser and more flexible as it also enables the court to take into account the various rights and legal principles that are being affected by the decision.

The Political Context

The story has not ended yet. Even if the Supreme Court may finally create a welcome precedent on this issue, other questions will remain. How should we assess, for instance, less threatening uses of a Nazi flag? And how about uses of other less threatening flags and symbols representing antiliberal ideologies? Personally, I would welcome an outcome that the penal provision on agitation against a population group would be applied also in less intensive uses of Nazi symbols, as is the case in Sweden.

At the same time, the Court's judgment comes at a time where topics related to racism and hate speech have become politically rather sensitive since the populist True Finns party forms part of the governing coalition and is leading some key ministries, including the Ministry of Justice. The True Finns are fighting for a broad construal of freedom of expression in order give room for anti-immigrant views. Some significant politicians in their ranks even have been convicted for hate speech utterances. One of their ministers already had to resign given his contacts to the extreme right which were deemed too close. In August 2023, the coalition government had to come out issuing a statement on equality and non-discrimination according to which it would continue combatting racism and defend human rights. It remains to be seen whether that was more of lip service and whether the statement was issued just to cool down public debate around the political tones of this government.

ABOUT THE AUTHOR

Kimmo Nuotio
Kimmo Nuotio is professor of criminal law and the Director of the Institute of Criminology and Legal Policy at the University of Helsinki.

SUGGESTED CITATION

Nuotio, Kimmo: Rallying under a Nazi Swastika Flag: Is it a Criminal Act?, Verfassungsblog, 24.04.2024, doi: 10.59704/3a03860ac166bed1.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20240424-185235-0.