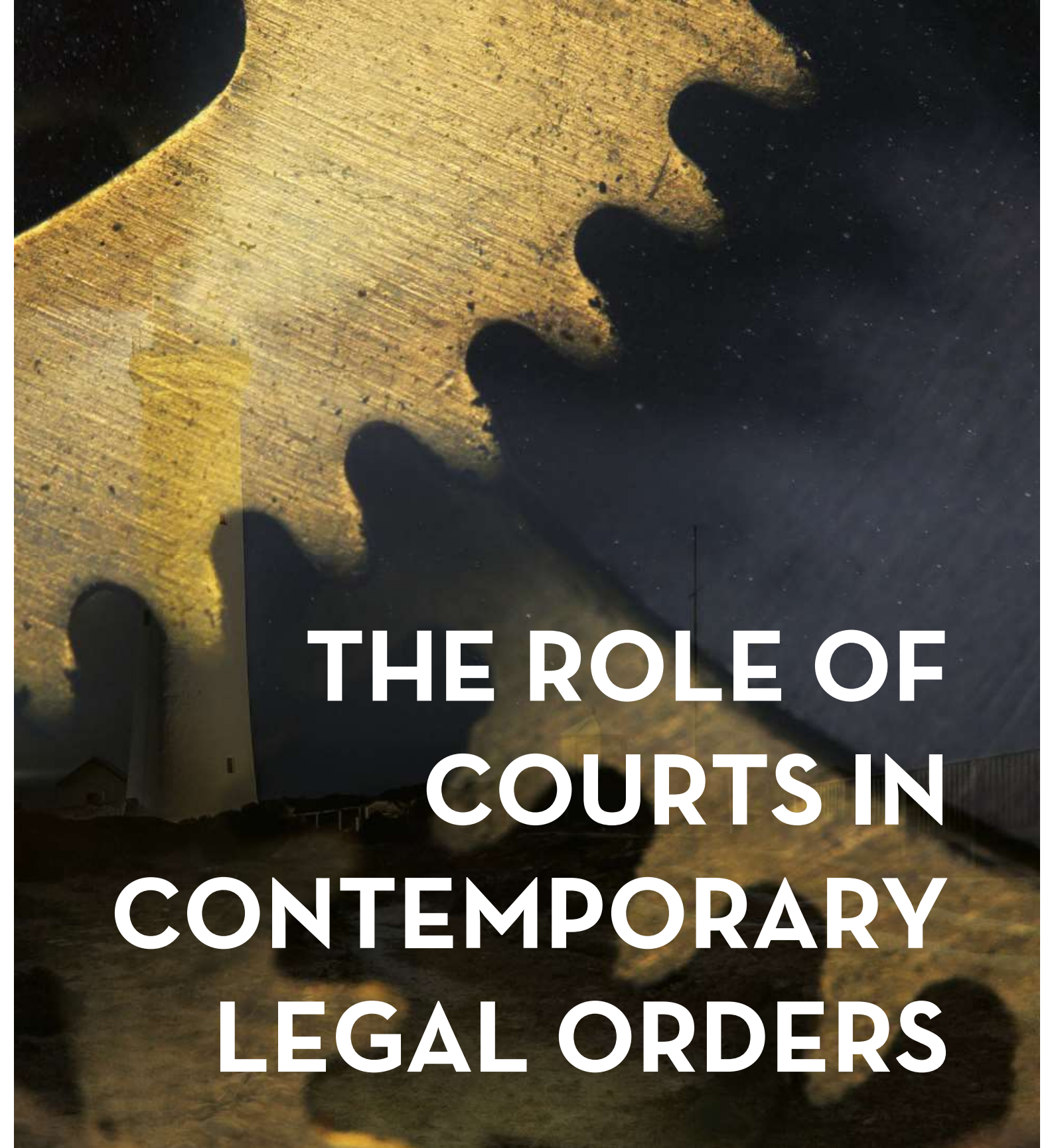




THE ROLE OF COURTS IN CONTEMPORARY LEGAL ORDERS

Martin Belov (Ed.)

eleven
international publishing

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Published, sold and distributed by Eleven International Publishing

P.O. Box 85576

2508 CG The Hague

The Netherlands

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e-mail: sales@elevenpub.nl

www.elevenpub.com

Sold and distributed in USA and Canada

Independent Publishers Group

814 N. Franklin Street

Chicago, IL 60610

USA

Order Placement: (800) 888-4741

Fax: (312) 337-5985

orders@ipgbook.com

www.ipgbook.com

Eleven International Publishing is an imprint of Boom uitgevers Den Haag.

ISBN 978-94-6236-920-7

ISBN 978-94-6274-481-3 (E-book)

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Printed in the Netherlands

26 THE FREEDOM OF EXPRESSION IN THE PRACTICE OF THE SUPREME COURT AND THE CONSTITUTIONAL COURT OF HUNGARY: WITH SPECIAL REGARD TO DEFAMATORY CRIMES

*Zoltan J. Toth**

26.1 DEFAMATORY CRIMES IN HUNGARY: STATUTORY PROVISIONS AND THE JUDICIAL PRACTICE

In Hungary, the legal protection of human dignity and honor is realized on four levels. In the cases of false factual statements, or true factual statements made without legitimate interest, the concerned person may demand the protection of criminal law or may turn to the civil court for compensation by reason of the impairment of his or her personality rights. If the statement was published in the press, the person may also initiate a lawsuit for correction.¹ During the criminal proceeding, the defamer may be prosecuted; during the civil procedure, restitution (formerly: non-material compensation), that is, pecuniary compensation, can be claimed from the defamer, whereas the result of the correction lawsuit may be that the court obliges the publisher of the press-product containing the defamation to apologize for the previous factual claim and to publish a correction notice. If the violation of honor was not a consequence of factual statements, but an utterance of degrading opinion or a value judgment, or a humiliating behavior, then certain cases of serious offense against personal interest may result in criminal proceedings, whereas in

* This chapter was written and the underlying research was carried out with the support of the Bolyai János Scholarship of the Hungarian Academy of Sciences and the Bolyai+ Scholarship within the framework of the New National Excellence Program of the Ministry of Human Capacities of Hungary.

1 These three procedures may as well be initiated in parallel.

moderate cases, a misdemeanor proceeding may be initiated. Hereinafter, I will only discuss the regulation on the *criminal law* protection of honor and the practicing of these rules within the criminal court system.²

In Hungary there were four main types of criminal cases for the protection of honor prior to 1994, whereas today there are three main types.³ The first one is defamation, the second one is slander and the third one is desecration. The fourth, annulled, case was the crime of ‘defamation of authorities or official persons’, which was declared unconstitutional by the Constitutional Court in 1994 and was annulled.

26.1.1 Defamation

As for defamation, according to both the current Criminal Code⁴ and the former Criminal Code⁵ being in effect prior to 2013,⁶ ‘any person who, in the presence of a third party, engages in the written or oral communication of any fact that is injurious to the reputation of another person, or uses an expression which directly refers to such a fact, is guilty of *defamation*.’⁷ As opposed to this, the misdemeanor or the offence of *slander* can be committed by any person, who, apart from the case of defamation, “uses a degrading expression that is injurious to the reputation of another person, or commits other act in this regard”.⁸ If this is committed (a) in connection to the professional activity, public office or public activity of the victim or (b) before the public at large, the offence of

2 For Hungarian civil and press law matters, *see, e.g.*: Koltay, András: A szólásszabadság alapvonalai. [Bases of the freedom of speech] Századvég, Budapest, pp. 408-425; Sajó, András: A szólásszabadság kézikönyve. [Handbook of the freedom of speech] MTA JTI – KJK, Budapest, 2005, pp. 145-164.; Benke, Gábor: Személyiségvédelem a médiajogban. [Protection of personality rights in the media law] In: Menyhárd, Attila – Gárdos-Orosz, Fruzsina: Személy és személyiség a jogban. [Person and personality in the law.] Wolters Kluwer, Budapest, 2016, pp. 175-192.; Koltay, András: Az emberi méltóság védelmének kérdései a médiaszabályozásban és a joggyakorlatban. [The protection of human dignity in the media regulation and the legal practice] In: Menyhárd – Gárdos-Orosz, op.cit., pp. 193-246.

3 With this, the Hungarian regulation of defamatory offences, in essence, does not differ from the European mainstream. As for the European Union, for instance, 23 of the 28 Member States criminalizes at least one of these acts. (For the European practice concerning the crimes of defamation and slander [insult], *see, e.g.*: Toth J., Zoltan: The regulation of defamation and insult in Europe. In: Koltay, András (ed.): Comparative Perspectives on the Fundamental Freedom of Expression. Wolters Kluwer, Budapest, 2015, pp. 487-517.)

4 Act no. C of 2012.

5 The statutory provisions regarding defamation and slander were rather similar to the present ones even from Hungary’s first criminal code, the so-called Code of Csemegi (having become effective in 1880). (See the historical evolution of the defamatory rules in Hungary: Toth J., Zoltan: The Regulation of Criminal Defamation and Insult in Hungary between 1880–1979. *Journal on European History of Law*, Vol. 9, 2018, No. 2, pp. 156-161.

6 Act no. IV of 1978.

7 According to the new Criminal Code, the offender is punishable by imprisonment for up to one year in principle. “The penalty shall be imprisonment not exceeding two years, if the defamation is committed: *a*) with malice aforethought or with malicious motive; *b*) libelously, before the public at large; or *c*) causing a significant injury of interest” [Act no. C of 2012, Art. 226, para. (2)].

8 Act no. C of 2012, Art. 227, para. (1).

slander is committed; in any other case, the misdemeanor of slander is considered. In addition, slander can be committed by physical assault as well.⁹ (Defamation only exists in the form of crime, and not as misdemeanor.) Finally, desecration is committed by any person who violates the memory of a deceased person by the means defined in the cases of defamation and slander.

As for the crime of defamation, the protected legal interest, similarly to slander, is *honor*.¹⁰ The Hungarian judicial practice interprets honor as having two sides: on the one hand, it is considered to be the self-esteem of a person, expressed by the category of *dignity*; on the other hand, it is the public appreciation and respect by the community for the person, expressed by the category of *reputation*. This means that honor is the general category that consists of two things: dignity and reputation. The violation of honor may occur either solely in case of violation of dignity or in case of violation of reputation alone; however, the judicial practice aims at objectifying the violation of dignity as, in this case, the main focus does not concern the *sense* of dignity, but the social perception of the decline of self-esteem and its assessment by the community (hence, the violations of dignity and reputation are getting closer in practice).

The criminal conduct of defamation is the communication of a fact. Three forms of communication are possible: the assertion (i.e., allegation) of a fact, transmission of a fact (passing on information derived from others) and the use of an expression directly referring to a fact. The latter [according to Justice of the Curia (Supreme Court), István Kónya] means “highlighting a characteristic aspect of a fact [...], from which [...] logically the whole event can be inferred”.¹¹ The asserted fact can be either false or true; in the latter case, defamation can be established if proving the truth is not permissible, or if it is permissible but remains unsuccessful. (I will discuss later what proof of truth implies.) It is irrelevant whether the offender knew about the truth or falsehood of the communicated fact and whether his or her intentions were in good or bad faith; however, the communicator of the fact must be aware that the fact he or she communicates is objectively capable of violating honor. The actual violation of the victim’s honor as a result, however, is not necessarily a corollary to this crime (so defamation also occurs if, for example, no one believes the fact communicated).

The communication of a fact can be carried out not only orally or in writing but in any other way as well, such as by depictions. The statement can be formulated not only in indicative mood but in conditional mood as well, and even in the form of a question.¹² Defamation may be committed against anyone: not just a natural person but also a legal

9 Slander is punishable similarly to the case of defamation [Act no. C of 2012, Art. 227, para. (1)].

10 For the possible meanings of honor in Hungarian criminal practice, cf.: Szomora, Zsolt: A becsület mint jogi tárgy. [The honor as a protected legal interest.] In: Menyhárd – Gárdos-Orosz, op.cit., pp. 247-268.

11 Kónya, István (ed.): Magyar büntetőjog. Kommentár a gyakorlat számára. [Hungarian penal law. Commentary for the legal practice.] HVG-ORAC, Budapest, 2013, p. 872. (E.g.: ‘Here come the sticky fingers of the company.’)

12 E.g.: ‘Do you still make a living out of prostitution?’

person, because legal persons do not have dignity, but they do have reputation (goodwill) – based on the Hungarian practice – which may be protected by the criminal law. The victim does not have to be named for the crime to occur, but must be clearly identifiable. Defamation can only be committed ‘in the presence of others’, which does not mean that other people should be at the same place where the assertion was made; the only requirement is that a third party be able to become aware of the stated fact.¹³ If the act (the communication of a fact injurious to honor) is carried out merely against the victim, without it being perceivable by a third party, then it can only be slander.

It was not the Criminal Code but the judicial practice that established that certain practices cannot be considered a crime even if they correspond to the factual elements of defamation. Thus, the statement of a fact is not a crime due to the lack of unlawfulness in the following cases: if it was made in order to comply with the obligation to report or the obligation to bear witness;¹⁴ if it was made by the parties to judicial proceedings and their attorneys, by the clients or their legal representatives in a public administration procedure in a relevant matter in the given case, without unnecessary insult or reproach;¹⁵ if it is included in a decision of an official, provided that it was necessary for determining the facts, evaluating the evidence or their legal qualification, overall, for the decision-making (including the verbal reasoning of the court order);¹⁶ the objective criminal report published in the press is not a crime;¹⁷ and the characterization related to the education of a minor is not a crime either. The findings of scientific, cultural, artistic debates (e.g. a book review) are not considered unlawful either, even if they objectively violate the reputation of the other party.¹⁸

26.1.2 Slander

As for the crime of slander, in the Hungarian law, it has four types in principle. The first one is slander committed by statement of facts. This is similar to the crime of defamation except for the fact that, in this case, no one knows about the communication but the communicator and the victim; therefore, the insult remains in private. (Almost everything that was previously said in the case of defamation is applicable here, too.) The second one is the use of an expression (either in private or in public) that is injurious to honor (which is not a statement of facts, but a degrading value judgment, humiliating

13 As a consequence of this, if allegations were made via email, by phone or in chat, defamation can be established as well.

14 E.g.: Principled Decision of the Supreme Court of Hungary (hereinafter: EBH) 2004. 1011.

15 E.g.: Case Decision of the Supreme Court of Hungary (hereinafter: BH) 2004. 267.

16 E.g.: BH 1991. 338.

17 BH 1999. 434.

18 For the issue of exemptions from criminal responsibility in defamatory cases, *see* in detail: Kis, Norbert – Hollán, Miklós – Gellér, Balázs: A büntető törvénykönyv magyarázata II. Különös rész, I. [Commentary on the Criminal Code II. Special Part, I.] Közlönykiadó, Budapest, 2008.

qualification, derogatory opinion) – this is termed ‘verbal slander’ by the Hungarian judicial practice in a rather misleading way as this kind of value judgment can be achieved in writing or by illustration, as well. The third kind of slander is an act (or, more precisely, a behavior) that is injurious to honor (either in private or in public). According to the Hungarian judicial practice, the mocking imitation of disability, humiliating posture, gesture or mimicry are such examples. In the end, the fourth one is the physical slander, for example slapping, spitting or throwing things at someone, if there is no permanent physical injury (because if there is one, the crime in question will be assault)¹⁹ – here, it is also irrelevant whether someone else is present.

According to the judicial practice, those expressing a mere opinion or criticism are not punishable, even if they do so in a strongly worded or ‘tough’ manner. Adopting a merely immoral, indecent, unusual, impolite conduct is not considered a crime, such as simple jokes, teasing, simple mockery, disrespect, nor swearing, cursing, rudeness, obscenity or other expressions of anger.

26.1.3 *Desecration and Other Crimes*

Desecration can be committed by the same conducts as defamation and slander, and the sanctions are also the same as those in the cases of defamation and slander.²⁰ The most significant difference is that the victim in this case is not actually the deceased person (whose memory, good reputation seems to be protected by the crime), but those living who are emotionally attached to the deceased and his or her social memory is not indifferent to them. According to the ministerial reasoning of the Criminal Code, the protected legal interest is “the social appreciation manifested in the memory of the deceased and the sense of piety of the relatives”. Accordingly, no person can file a private motion against the perpetrator dishonoring the deceased, but only the relatives and heirs of the deceased.²¹

Finally, we merely mention that in addition to defamation, slander and desecration, there are other defamatory crimes in the current law (“degrading treatment of vulnerable persons”;²² “production of sound or video recording of a defamatory nature”²³ and “pub-

19 For example, simple redness on the skin constitutes only slander (BJD 6445.), while a bruise, as a result of the act, constitutes assault [Criminal Case Decision Archive (hereinafter: BJD) 6345].

20 Literally: “Any person who violates the memory of deceased persons by the means defined in Section 226 or Section 227 is guilty of a misdemeanor punishable as defined therein” (Act no. C of 2012, Art. 228).

21 Act no. C of 2012, Art. 231, para. (3).

22 “Any person who exhorts another person by exploiting his vulnerability to engage in conduct to humiliate himself is guilty of a crime [...], insofar as the act did not result in a more serious criminal offense.” Act C of 2012, Art. 225, para. (1).

23 “Any person who produces a falsified or forged sound or video recording or a sound or video recording with untrue contents with intent to injure the good name or reputation of another person or persons, is guilty of a crime [...], insofar as the act did not result in another criminal offense.” Act C of 2012, Art. 226/A.

lication of sound or video recording of a defamatory nature”;²⁴ as well as the “insult of authority”²⁵ and “insult of subordinate”²⁶ regulated among military crimes); however, the practical significance of these crimes is negligible.

26.1.4 *Common Provisions for Defamatory Offences*

The allegation of a fact thus can be (1) defamation (if a third party was present, in the sense mentioned before), (2) slander (if the statement of facts was said in private) and (3) desecration (if the statement of facts concerned a deceased person), if this communication objectively violated the dignity or reputation of the victim. Nevertheless, the offender is not punishable if the stated fact proves to be true. However, proving the truth is not permissible in all cases; it is permissible only if the communication of the fact was justified by the public interest or the legitimate private interest of anyone.²⁷ This criterion implicitly prohibits the possibility to prove the statement of facts related to the private and family life if this statement of facts is both indifferent for the public and unnecessary for the protection of others’ rights.

In the case of ordering – without a formal decision²⁸ – to prove the truth (the failure of which is a substantive infringement that may lead to the annulment of the judgment²⁹ and the ordering of which does not depend on the probability of success),³⁰ the burden of proof is reversed:³¹ while the general rule resulting from the presumption of innocence is that the accuser has to prove, in the case of defamatory offenses, the accuser only has to prove that (1) the statement of facts was made, (2) it was performed by the accused person, (3) in a willful manner – after which the defendant has to prove the truth of their allegation, namely that, regarding its essence,³² the assertion is objectively true. (It is not necessary for every small detail to match exactly the reality; however, substantial deviation is not allowed.) Since burden of proof is on the side of the communicator, if the

24 “Any person who makes available to the public a falsified or forged sound or video recording or a sound or video recording with untrue contents with intent to injure the good name or reputation of another person or persons, is guilty of a crime [...]” Act C of 2012, Art. 226/B, para. (1).

25 “Any person who affronts the authority: *a*) of a superior officer, *b*) of a person in a position senior to his, a guard or other representative of public authority in the line of duty, in front of others or in a conspicuously gross manner is guilty of a crime [...]” Act C of 2012, Art. 447, para. (1).

26 “Any person who insults his subordinate in his human dignity in front of others or in a manifestly gross manner is guilty of a crime.” Act C of 2012, Art. 449, para. (1).

27 Cf.: Act no. C of 2012, Art. 229, para. (2).

28 BH 1992. 226.; BH 1994. 171.

29 BH 2000. 285.

30 EBH 1999. 87.

31 From the judicial practice, *see, e.g.*, BH 1998. 412.

32 BJD 7511.

defendant cannot prove the compliance with reality of the fact communicated by him or her, the person commits defamation, slander or desecration.³³

It is a procedural rule that there is a possibility to make counterclaims if the defamation or the slander is mutually committed by the parties; however, there is a practice followed in several European countries according to which, in the case of mutually committed defamation and slander, the judge may avoid to impose punishment. This is not possible under Hungarian law.

26.2 THE DEFAMATORY OFFENCES IN THE PRACTICE OF THE CONSTITUTIONAL COURT OF HUNGARY

26.2.1 *Introductory Theoretical Considerations*

In the jurisprudential thinking, three modes of justification have been elaborated in order to protect freedom of expression. This protection can serve (1) searching for the truth, (2) democracy and (3) personal liberty. The service of truth and the service of democracy can be called the instrumental or collective or utilitarian justification of freedom of expression, whereas the principle of individual autonomy can be called the constitutive or individual or deontological justification thereof.

From a historical point of view, initially John Stuart Mill's argument for searching for the truth became the key concept that grounded theoretical conceptualization. According to Mill, there are three various cases for suppressing an opinion, and all three of them have negative implications for society as a whole, hence persecution of opinions is incorrect from a utilitarian perspective. The first case is, if the opinion is true. No matter how uncomfortable or harmful an opinion is, it may nevertheless be true; not even the majority can state that they possess the ultimate truth or that they are infallible. Suppressing an opinion that is true is wrong not because it is unjust but because it leads society astray; in other words, it leads to bad decisions in practice.

The second option is if both the suppressed opinion and the majority opinion are partially true; in this case, the former is able to complete the latter, hence the partially true opinion can contribute to the development of knowledge. In this case, it is not a problem (or it is even an advantage according to Mill) if the promoters of the suppressed, partially true opinion advocate it as an ultimate and perfect truth, because a radical opinion is much more likely to make the audience or the readers think. Finally, the third option is if the suppressed minority opinion is false and the majority opinion is true. Many believe that banning a false opinion (sanctioned by the state) can be useful; how-

33 It is therefore not necessary for the fact communicated to prove to be untrue; it is enough if doubt arises with regard to the truthfulness of the fact – below the level of certainty. (Cf. BH 540. 1999.)

ever, this is actually not the case. A false (and harmful, immoral, shocking etc.) opinion can be used to clash the truth and the possible counterarguments, hence the majority, true opinion can be reinforced by reacting to the false arguments. If we do not allow an opinion to be challenged, then the ‘truth’ will be degraded to pure prejudice or dogma. (These latter are in fact two separate results – so, according to Mill, the above-mentioned three possibilities are in fact four possibilities.)³⁴

The second possible justification of freedom of expression is the service of democracy, which is likewise a utilitarian argument.³⁵ According to this notion, freedom of expression is important, because a democracy cannot be imagined without it; the free debate in public affairs is in the interest of every member of the political community. People can only express their will in a given issue if they are aware of the underlying facts, arguments and counterarguments; if people are precluded from gaining knowledge in public affairs, then they are virtually denied of the right to make responsible and informed decisions.

Finally, the argument of autonomy,³⁶ that is, the constitutive justification of freedom of expression, protects free speech as the expression of personality, irrespective of any

34 In Mill’s own words: “We have now recognised the necessity to the mental well-being of mankind (on which all their other well-being depends) of freedom of opinion, and freedom of the expression of opinion, on four distinct grounds [...]. First, if any opinion is compelled to silence, that opinion may, for aught we can certainly know, be true. To deny this is to assume our own infallibility. Secondly, though the silenced opinion be an error, it may, and very commonly does, contain a portion of truth; and since the general or prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied. Thirdly, even if the received opinion be not only true, but the whole truth; unless it is suffered to be and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds and not only this, but, fourthly, the meaning of the doctrine itself will be in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct: the dogma becoming a mere formal profession, inefficacious for good, but cumbering the ground, and preventing the growth of any real and heartfelt conviction, from reason or personal experience.’ [Mill, John Stuart: *On Liberty* (1859). Batoche Books, Kitchener, 2001, pp. 49-50.]

35 The first wording of this thought can be read in Meiklejohn’s book; cf.: Meiklejohn, Alexander: *Free Speech and its Relation to Self-Government*, pp. 9-10. In: Meiklejohn, Alexander: *Political Freedom: The Constitutional Powers of the People*. New York, Harper & Row, 1965. [It has to be added that Meiklejohn kept in mind the model of municipal local self-government, so his views (e.g., The possibility of free participation and speaking at the ‘meeting’) can only be used to a limited extent at national level, and that speech is only meaningful to the public when it comes to political matters (*i.e.* Public affairs); otherwise, it may be limited.]

36 However, autonomy can be not only the autonomy of the communicator but also that of the recipient. According to Scanlon, for instance, the state can only address the rights of its citizens in so far as this state intervention leaves citizens with the opportunity to continue to regard themselves as “equal, autonomous and rational agents”. [Cf. Scanlon, Thomas: *A theory of freedom of expression*. 1(2) *Philosophy & Public Affairs* (1972), pp. 215.]

external social aim;³⁷ therefore, with this approach, the protection of free speech is an end in itself – the expression of personality is an intrinsic value.³⁸

26.2.2 *The First Step in Protection of Freedom of Expression in the Practice of the Hungarian Constitutional Court*

From among the above-mentioned three conceptual frameworks, the democratic and constitutive justifications do appear in the practice of the Hungarian Constitutional Court, but the former one is predominant. According to the Constitutional Court Decision No. 30 of 1992,

the freedom of expression has a special place among fundamental constitutional rights; it is the ‘mother right’ of several other freedoms, the so-called fundamental rights of communication.³⁹ [...] The right to freedom of expression protects opinion irrespective of its value or the veracity of its content. Every opinion, good and damaging, pleasant and offensive, has a place in this social process, especially because the classification of opinions is also the product of this process.⁴⁰

This decision contained the double justification of freedom of expression: the Constitutional Court claimed that this right serves both the moral understanding of the individual

37 According to constitutive or moral justifications, freedom of speech is to be defended solely on the grounds (regardless of the consequences of the protection) that it is an essential feature of a just political community to regard all responsible members (responsible moral agents) as responsible persons; however, the justification of autonomy has two dimensions. On the one hand, any morally responsible individual has the right to be aware of opinions that convince him that his previous view was wrong; on the other hand, they also have the right to declare their own convictions, regardless of whether anybody else considers these convictions to be true or valuable. (Dworkin, Ronald: *Freedom’s Law: The Moral Reading of the American Constitution*. Oxford – New York, Oxford University Press, 1996., pp. 200-201.)

38 In the practice of the Hungarian Constitutional Court – following the division of Ronald Dworkin [cf.: Dworkin, Ronald: Foreword. In: Hare, Ivan – Weinstein, James (eds.): *Extreme Speech and Democracy*. Oxford – New York, Oxford University Press, 2009., pp. v–ix.] – the search for truth and the service of democracy are two parts of the *instrumental justification* of freedom of expression, while the argument of individual autonomy (which ensures the self-expression and the deployment of the personality) is called the *constitutive justification* of freedom of expression. Similarly, according to the Constitutional Court of Hungary, “[t]he theoretical justifications for freedom of expression and the press have traditionally been divided into two major groups. Among the justifications that can be called instrumental, it is to be highlighted those that focus on the search for truth or on the service of democratic publicity, while the justifications called constitutive focus on individual self-expression and individual autonomy.” {CC Decision no. 7 of 2014. (III. 7.), Reasoning [9].}

39 E.g., Freedom of speech, freedom of the press, the right to freely obtain information, freedom of religion and conscience, right of assembly.

40 CC Decision no. 30 of 1992. (V. 26.), Constitutional Decisions’ Archive (hereinafter: ABH) 1992, 167, 179.

right to freedom of expression and “the conditions for the creation and maintenance of a democratic public opinion”.

26.2.3 *The Leading Case on Defamatory Crimes: The CC Decision No. 36 of 1994*

Until 1994, there also existed the crime of ‘defamation of authorities or official persons’; however, this was declared unconstitutional and annulled by Decision no. 36 of 1994 of the Constitutional Court.⁴¹ This crime virtually punished the criminal conducts of defamation and slander if these were specifically committed against a state or local authority (as a legal person), or against the officials of these.⁴² The Constitutional Court declared it unconstitutional, because this crime contained more severe sanctions than defamation and slander. Namely, the same behavior was punished more seriously by the Hungarian criminal law norms when the victim was an authority or an official. The Constitutional Court ruled that the criminal law protection of the reputation of authorities and official persons is not unlawful, but it should be proportionate to the right to freedom of expression; and it is disproportionate if the right to free expression is more restricted in case of officials than otherwise (namely, if officials are protected by criminal law to a greater extent than others).

In addition, Decision no. 36 of 1994 of the Constitutional Court also included a constitutional requirement for the judicial application of the crime of *slander*, according to which:

the sphere of expression has to be broader in relation to persons and institutions who exercise public authority and politicians who act in public than as regards other persons. An expression of a value judgement capable of offending the honor of an authority, an official person or a politician, which was expressed with regard to their public capacity is not punishable under the Constitution; and an expression directly referring to such a fact is only punishable if the commissioner [...] knew that the essence of their statement is false or did not know about its falseness, because they failed to pay attention or exercise caution which had been reasonably expected of them, pursuant to the rules applicable to their profession.⁴³

In short: according to the Constitutional Court, *slander* cannot be committed against officials or politicians in any case by a mere expression of opinion if such defamatory

41 At the same time, since the annulment did not have a retroactive effect, this provision had to be applied for such acts committed before June 1994 (until the early 2000s, the courts issued judgments in such cases).

42 This crime was most often committed against police officers who were serving at the time.

43 CC Decision no. 36 of 1994 (VI. 24.), ABH 1994, 219, operative part 1.

acts are related to their status of this context. By doing so, the Constitutional Court virtually made a legislation (according to László Sólyom, president of the Constitutional Court at the time, “the Constitutional Court wrote into the Criminal Code”),⁴⁴ whereas the literal text of the Criminal Code remained unchanged.

26.2.4 *The Opposition of Ordinary Courts against the Constitutional Considerations*

Although under Hungarian Fundamental Law, the decision of the Constitutional Court is binding for every natural and legal person, even for ordinary courts, the judicial practice did not follow the standards set by the Constitutional Court for a long time. This requirement was clear: the obligation of politicians to endure criticism is greater than that of ordinary citizens and those who criticize them cannot be punished for their defamatory opinions; only the assertions against them may be punished (and only if the statement is objectively false, or true, but is not related to the official activity or politician status of the victim). Nevertheless, the ordinary courts confronted the instruction of the Constitutional Court, and they continued to sanction in their practice the excessive, offensive, defamatory opinions and other acts (as if the Constitutional Court had not determined any constitutional requirement). The courts thus actually continued their practice from before 1994, according to which there is a ‘defamatory threshold’ or ‘limit of offense’,⁴⁵ beyond which an opinion cannot go, even in the case of a public figure or an official – although, according to the Constitutional Court, there is no such limit and politicians must always endure the diatribes expressed in certain opinions (if these opprobrious expressions concern their status of politician and not that of private person); however, there were two problems with this court practice that remained from before 1994.

One is that the Supreme Court did not set any standard regarding these cases whether a particular utterance can be considered an opinion or a statement of facts. For this reason, it was up to the court or, in many cases, to the personality of the judge whether a particular communication was considered a statement of facts (i.e. defamation) or an abusive expression of opinion (i.e. slander). The other problem was that there was no standard either to measure the degree of exaggeration, provocation and reproach that

44 Tóth, Gábor Attila: A „nehéz eseteknél” a bíró erkölcsi felfogása jut szerephez. Beszélgetés Sólyom Lászlóval, az Alkotmánybíróság elnökével. [In ‘hard cases’, the judge’s moral sense prevails. Conversation with László Sólyom, President of the Constitutional Court.] *Fundamentum*, 1997/1., pp. 31-43. In addition: “[i]n fact, these crimes were actually modified.” (Sólyom, László: Kölcsönhatás az Emberi Jogok Európai Bíróságának esetjoga és a szólásszabadság védelme között Magyarországon. [Interaction between the case-law of the European Court of Human Rights and the protection of the freedom of expression in Hungary.] *Állam- és Jogtudomány*, 1996–1997/3-4, p. 170.)

45 Cf.: Szomora, Zsolt: Az alkotmányos követelmények hivatkozási tipológiája becsületsértési és rágalmozási ügyekben hozott büntetőítéletekben. [Reference typology of constitutional requirements in criminal convictions in defamation and slander cases.] *Jogtudományi Közlöny*, 2014/10, pp. 469-476.

would make an opinion punishable for slander. For these two reasons, the judgments of the courts were inconsistent.

I will discuss only a few specific examples. The Supreme Court evaluated as a *lawful* expression of opinion the case in which a journalist wrote about a far-right politician that he was ‘anti-Semitic’, as well as ‘lunatic’. The court evaluated as a statement of fact (*punishable* defamation) the case in which a critic of a local government politician said that he was ‘uneducated’. It was considered a *lawful* expression of opinion when a journalist was said to be a ‘liar’. The statement according to which the victim is a ‘real criminal’ was considered *unlawful* expression of opinion and thus slander. It was *not punishable* to read a musician’s poem on the radio, in which the following were said about the director at the time of the administrative office of Budapest: “Or there is the half-witted László Grespi, put a rope around his neck, and let him hang!” According to the court, the musician did not commit defamation or slander,⁴⁶ because a politician is expected to tolerate even exaggeration and provocation.⁴⁷ So it seems to be obvious that the Hungarian criminal courts could not decide where this threshold should be drawn.

In one of the most important criminal procedures in Hungary, it was evaluated as a statement of facts (and therefore, defamation was established) when a journalist wrote about the former parliamentary representative, Imre Mécs, a revolutionary sentenced to death after the revolution against the Soviets in 1956, that he had escaped from death penalty in the end, because he had betrayed his fellows and some of them were executed as a result of his betrayal. It is interesting that this was the only judgment after the political transformation of 1990 in which the offender (not the journalist himself, but the editor-in-chief of the newspaper, András Bencsik) was sentenced to enforceable imprisonment (however, this was modified later to suspended imprisonment in the second instance, and the Supreme Court ultimately reduced the sentence to fine). Every court concluded that this utterance was a statement of facts that was made in a matter of public interest, but the editor-in-chief was not able to prove the truth of this allegation.⁴⁸

Regarding the defamatory *expressions of opinion*, the judicial practice was even more unstable. As I have mentioned, according to the Constitutional Court, politicians and officials were expected to tolerate reproach in all cases (*unless the reproach would violate*

46 Cf. Case Decision of the third instance of the Court of Appeal of Budapest, Bhar.200/2008/5.

47 By the way, the same uncertainty also occurred in civil law matters. Some examples from lawsuits for the protection of personality are: The following statements were found to be lawful by the courts: ‘liar’, ‘fraudulent’, ‘soulless’, ‘traitor’; but ‘evil person with AIDS’, ‘paranoid’, ‘cockroach’, ‘coming from a questionable background’, ‘raffish figure’ were considered unlawful.

48 Otherwise, in Hungary, no prison sentence was ever enforced lawfully for defamatory crimes – as opposed, for example, to the practices from Italy, Austria or Germany, where this happens sometimes. Even suspended imprisonment is rare in such cases; typical is fine, but even more the probation, which (in addition to the establishing of having committed the crime) implies in Hungarian law the postponement of imposing the sentence.

the unrestrictable core of human dignity),⁴⁹ but the judicial practice considered the existence of a ‘diatribe threshold’, thus the seriously offensive opinions or other acts were actually punished by Hungarian courts. The base decision of this judicial practice was a judgment from 1995,⁵⁰ according to which:

Disparaging, degrading, vituperative or opprobrious utterances, which seriously violate human dignity made against authorities or officials – as a result of the decision of the Constitutional Court – constitute the crime of slander at most, which is punishable on a lawful private motion.

Later the criminal courts always referred to this decision seeing it as a quasi-precedent, though it was not made by the Supreme Court, but merely a provincial court of appeal.⁵¹ In the end, however, this practice was also approved by the Supreme Court in 2001 when it declared in a case:

The crime of slander is established if, in relation to the official operation of the mayor (at the same time, parliamentary representative) as a private plaintiff, the defendant uses expressions that go beyond the exercise of the constitutional rights related to the expression of opinion, exceed the degree the toleration of which is expected of public figures and politicians due to their status and which are injurious to the human dignity and reputation of the victim.⁵²

There were great differences between courts regarding where this border should be drawn. For example, the *crime of slander* was established in a concrete case, because of a statement that contained that the insulted policeman was a “communist hireling,

49 For example, in an election case, the Constitutional Court ruled that *identification of persons (even politicians) with animals infringes the unrestrictable core of the fundamental rights of these persons*. {In this case, during the campaign of the parliamentary elections in 2014, a candidate wanted to have a TV company broadcast a political advertisement in which he depicted two prime ministers (his political rivals: Viktor Orbán and Ferenc Gyurcsány) as monkeys. More precisely, in this TV spot, a monkey hangs on the voice of the two prime ministers, rapping and dancing while taking a large pile of bananas around him. The TV company rejected to fulfil the candidate’s request; and later this rejection was qualified by both the election committees and the Supreme Court as legitimate. The candidate turned to the Constitutional Court against the decision of the Supreme Court, but the Constitutional Court held that this decision is not unconstitutional as the identification of humans with animals dehumanizes the persons concerned. Cf.: CC Decision 3122 of 2014. (IV. 24.), Reasoning, [17]}

50 BH 1995. 6.

51 Baranya County Court.

52 BH 2001. 99.

henchman of ÁVO, bastard”,⁵³ while in another case the expression of “asshole policeman” had the same result.⁵⁴ The court did *not* find the expression of “cocksucker policeman”,⁵⁵ nor that the insulted mayor was “corrupt” defamatory.⁵⁶

26.2.5 *The Introduction of the Constitutional Complaint into the Hungarian Legal System: A New Approach of the Constitutional Court to the Practice of Ordinary Judges in Cases of Defamation and Slander*

For a long time, nothing could be done with the above-mentioned incoherent, divergent judicial practice, because the Constitutional Court had no power to annul concrete judicial decisions that violated the constitutional requirements it had set. This was the case until 2012, when the so-called ‘real constitutional complaint’⁵⁷ was introduced into the Hungarian legal system, which made it possible for interested people to turn to the Constitutional Court not only against unconstitutional laws but against unconstitutional ju-

53 ÁVO (State Protection Department of the Hungarian State Police) was the secret service of the communist regime.

54 Case Decision of the third instance of the Court of Appeal of Szeged, Bhar.I.103/2012/4.

55 Case Decision of the third instance of the Court of Appeal of Pécs, Bhar.II.99/2011/7.

56 Case Decision of the third instance of the Court of Appeal of Budapest, 5.Bhar.213/2008/12.

57 For the real constitutional complaint, *see in detail*: Tóth J., Zoltán: Az egyéni (alap)jogvédelem az Alkotmányban és az Alaptörvényben (I-II. Rész). [The Protection of (Fundamental) Rights in the Constitution of the Republic of Hungary and the Fundamental Law of Hungary (Part I and II).] *Közjogi Szemle*, 2012/3., 2012/4., pp. 11-19, 29-37. For certain parts of the new competencies and practice of the Constitutional Court, *see, e.g.*: Balogh, Zsolt: Alkotmánybíróság. [Constitutional Court] In: Trócsányi, László – Schanda, Balázs (eds.): *Bevezetés az alkotmányjogba*. [Introduction to constitutional law] HVG-ORAC, Budapest, 2012, pp. 343-374; Cservák, Csaba: *Sajátos alkotmánybíráskodási modellek*. [Specific Models of Constitutional Jurisdiction], pp. 60-62. In: *Jogelméleti Szemle*, 2015/3., pp. 59-66.; T. Kovács, Júlia: *Vélemény- és sajtószabadság*. [Freedom of speech and press] In: Csink, Lóránt (ed.): *Alkotmányjog*. [Constitutional law] *Novissima*, Budapest, 2014, pp. 44-54.; Bitskey, Botond – Török, Bernát: *Az alkotmányjogi panasz kézikönyve*. [Handbook of the constitutional complaint] HVG-ORAC, Budapest, 2015; Téglási, András: *The Protection of Fundamental Rights in the Jurisprudence of the Constitutional Court of Hungary after the New Fundamental Law Entered into Force in 2012*. In: Sente, Zoltán – Mandák, Fanni – Fejes, Zsuzsanna (eds.): *Challenges and Pitfalls in the Recent Hungarian Constitutional Development: Discussing the New Fundamental Law of Hungary*. L'Harmattan, Paris, 2015.

dicial application of laws and individual judicial decisions as well.⁵⁸ This enabled the Constitutional Court to control judicial decisions and the judicial practice.

The first such decision made in a case of criminal defamation was brought in April 2014.⁵⁹ In this case, the ordinary court had to make a decision in a public debate from a small town (Siklós). The debate was between the mayor and one of the municipal representatives of the city, going on for years by the time; as one of its stations, the local representative stated the following:

While they do not feel sorry about spending the money of taxpayers on themselves and manage it as if it was theirs, the [...] town administration [...] came up with a drastic austerity package [...].

According to the court of first instance,⁶⁰ the statement that they manage the money of the city as if it was theirs was an expression that directly referred to a fact, based on which the representative essentially accused the mayor of embezzling the money of the town; however, he could not prove this, thus he committed the crime of defamation and therefore the court sentenced the offender to a fine. The court of second instance agreed with the court of first instance and upheld its decision.⁶¹

The convict turned to the Constitutional Court, and the Constitutional Court found that the courts violated the local representative's right to freedom of expression. The statement was made in a matter of public interest (it was about the criticism of the wealth management of the local government) and the addressee of this statement was a politi-

58 Interestingly, the introduction of the constitutional complaint against 'real' court judgments has already occurred during the change of regime; however, due to the resistance of the Supreme Court and the indifference of the Opposition Roundtable (as they considered the introduction of the *erga omnes* procedure, which makes it possible for everyone to initiate a posterior abstract norm control than that of the 'real' constitutional complaint, which would serve as the means of the individual/basic/legal protection), it was eventually removed from the agenda of constitutional issues. (See: The Introduction of Sólyom László, p. 19. In: Halmai, Gábor – Tóth, Gábor Attila: *Emberi jogok*. [Human rights] Osiris, Budapest, 2003, pp. 13-20.) After this, the idea of introducing the 'real' constitutional complaint was raised from time to time, most recently by the Constitutional Court and its president, who formulated at the beginning of the constitutional process the need to ensure an institution that would protect individual legal rights – concurrently with the abolition of the possibility of posterior abstract norm control – thus the constitutional body would be the one that constituted the 'real' constitutional complaint. (For details see: The letter written by Paczolay, Péter, the president of the Constitutional Court addressed to Salamon, László, the president of the commission founded for the elaboration of the Constitution, on September the 29th 2010: www.parlament.hu/biz/aeb/info/ab.pdf.) The introduction of this legal institution was also promoted by several other constitutional lawyers (see for instance: Halmai, Gábor: The constitutional complaint – present and future? In: *Bírák Lapja*, 1994/3-4, pp. 45–50; Kovács, Kriszta: Essential Content of Constitutional Jurisdiction. *Alkotmánybírósági Szemle*, 2011/1, pp. 93-99; Bihari, Mihály: Constitutional Court and Constitutional Jurisdiction, p. 212. In: *Magyar Jog*, 1999/4, pp. 200-214).

59 CC Decision no. 13 of 2014 (IV. 18).

60 District Court of Siklós, 4.B.85/2012/16.

61 Regional Court of Pécs, 4.Bf.276/2013/7.

cian, who has a greater obligation of enduring criticism and who has to tolerate indefinitely the opinions even if these opinions are intensified or offensive. According to the Constitutional Court, the text did not actually contain any factual statement, only a very negative value judgment, and everyone should have the right to this against a politician; otherwise, the free, fearless public debate would be impossible. (Here, the Constitutional Court explicitly refers to the practice of the European Court of Human Rights, and the danger of the ‘chilling effect’ within it.)⁶²

Finally, in this case, the Constitutional Court also defined in principle the aspects that have to be examined by ordinary courts in cases of defamation. According to these, it is first necessary to decide whether a given statement was made in a public debate and if so, then secondly, whether it was a factual statement or only a value judgment (the latter is not constitutionally punishable).⁶³ Thus, this decision of the Constitutional Court provided aspects applicable for the courts;⁶⁴ moreover, the Constitutional Court clearly stated that, in the future, it will exercise its new competence for annulling those ordinary judicial decisions that are contrary to the constitutional criteria. Furthermore, decision no. 13 of 2014 of the Constitutional Court included another important innovation: instead of *public figure* it placed *public affair* in the center of constitutional examination, thus the focus shifted from subjective aspects to objective ones; so it is no longer important whether the criticized person is generally a public figure (e.g. a politician), but instead whether the statement is made in relation to a public affair.⁶⁵

⁶² CC Decision no. 13 of 2014 (IV. 18.), Reasoning, [30].

⁶³ The difference between the two is that “as opposed to value judgments, the statements of facts always contain concrete facts the reality of which can be justified and verified by proof”. CC Decision no. 13 of 2014 (IV. 18.), Reasoning, [41].

⁶⁴ This decision followed the fourth amendment of the Fundamental Law of Hungary of 2013, which amended the constitution with the following text: “The right to freedom of expression may not be exercised with the aim of violating the human dignity of others.” [Art. IX para. (4) of the Fundamental Law.] However, according to the Constitutional Court, this modification did not cause any real change in the constitutional approach to the contradiction between the right to dignity and the right to freedom of expression. (Cf.: Téglási, András: Véleményszabadság vs. Emberi méltóság – Egy rejtélyes alaptörvény-módosítás nyomában. [Freedom of speech vs. Human dignity – In the trace of a mysterious constitutional amendment] Acta Humana, 2015/6, pp. 25-47.

⁶⁵ See also: CC Decision no. 28 of 2014. (IX. 29.); CC Decision no. 31 of 2014. (X. 9).

Thus, the Constitutional Court applies certain elements of the criteria elaborated by the European Court of Human Rights⁶⁶ for the judgments of ordinary courts,⁶⁷ and it expects the implementation of this from the Hungarian courts since 2014. Since then, up to the end of 2018, there has been only one criminal case in which the courts deviated from the constitutional requirements: in this case, a private individual criticized the local notary in a Facebook post, classified her as a “clan” member, claiming that the notary is “racist” and discriminates the Roma. This was considered a crime (partly defamation and partly slander) by the court of first instance, the court of second instance and the Supreme Court, as well; however, according to the Constitutional Court, the ordinary courts violated the defendant’s right to freedom of expression, thus it declared these judgments unconstitutional;⁶⁸ however, besides this single case, since 2014, there has been no criminal case in which the conflict between the right to freedom of expression and the right to human dignity would have been judged by the ordinary courts in a way contrary to the constitutional criteria⁶⁹ – and in the light of the current judicial practice, we can expect that this will remain in the future as well.

66 Summarizing the aspects of the Court, without enumerating these aspects in detail, one by one, it can be said that the key consideration is whether the statement in question concerns a matter of public interest and whether sanctioning it would impede the development or functioning of a democratic society; if it does, the Court consistently establishes breach of the convention; therefore, it places the protection of freedom of expression above the protection of dignity, reputation and honor.

67 For these criteria and the practice of the ECtHR related to defamatory cases, *see in detail*: Tóth J., Zoltán: A defamatorikus deliktumokkal kapcsolatos részes állami büntetőbírószági döntések megítélése a strasbourgi bíróság gyakorlatában. [Judgement of the decisions of the Member States’ criminal courts concerning defamatory cases in the practice of the European Court of Human Rights.] In: Koltay, András – Török, Bernát (eds.): *Sajtószabadság és médiajog a 21. Század elején* 4. [Freedom of the press and media law at the beginning of the 21st century.] Wolters Kluwer, Budapest, 2017, pp. 309-423.

68 CC Decision no. 3263 of 2018 (VII. 20).

69 This claim is not true for the cases concerning the protection of the likeness of police officers. In the course of this, the Constitutional Court had to repeal several ordinary courts’ decisions since some of those favored the personality rights of police officers over the freedom of the press – in opposition to the constitutional requirement set up by the Constitutional Court. {For more details, *see, e.g.*: Tóth J., Zoltán: *Rendőrképmás: sajtószabadság és képmáshoz való jog a polgári jogi és az alapjogi jogosultságok keresztútján*. [Likeness of police officers: Freedom of the press and the right to facial likeness at the crossroad of civil and fundamental rights] *Pro Futuro*, 2017/2., pp. 110-128.; Orbán, Endre: *A (rendőr)képmás és kerete: az alkotmánybírószági határozatok helye a jogrendszerben*. [The facial likeness of police officers and its framework: the place of the decisions of the Constitutional Court in the legal system] *Jog Állam Politika*, 2018/2, pp. 41-58.}