

Case-based reasoning as a measure of constitutional adjudication

Remarks on the jurisprudence of the Hungarian Constitutional Court in defamation cases

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ABSTRACT

Case-based reasoning has high significance in constitutional adjudication. The constitutional courts of the Kelsenian model also follow their own previous decisions to develop their own case law, even if those decisions do not bind them formally. In the course of constitutional interpretation, to build coherent and predictable case law and determine constitutional principles and standards in a consistent way are also reasonable expectations of constitutional adjudication deriving from the rule of law. The paper analyses the case law of the Hungarian Constitutional Court from this perspective, regarding the criticism of public figures in defamation cases. It takes case-based reasoning as a measure of the case law of the HCC, reveals the tendencies and highlights the main problems associated with it.

KEYWORDS

case-based reasoning, Hungarian Constitutional Court, freedom of expression, public figures, defamation

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1. INTRODUCTION

Case-based reasoning has high significance in constitutional adjudication. On the one hand, constitutional courts¹ take into account and follow their own previous decisions to develop their own case law, even if those decisions do not bind them formally. On the other hand, constitutional courts use foreign jurisdictions – such as judicial decisions of foreign national constitutional courts or international tribunals – that develop and supplement their interpretation.²

The approach of constitutional courts to their own case law is a crucial subject of the analysis of constitutional jurisprudence.³ In the course of constitutional interpretation, to build coherent and predictable case law and determine constitutional principles and measures in a consistent way are also reasonable expectations of constitutional adjudication deriving from the rule of law. For this reason, while analysing the jurisprudence of a constitutional court we can take as a measure the application of the methods of case-based reasoning.

This study aims to analyse the case law of the Hungarian Constitutional Court ('HCC') from this perspective regarding the criticism of public figures in defamation cases. The conflict of human rights involved in these cases constantly challenges both the HCC and the ordinary courts. The courts have to balance between the freedom of expression and the press and the public interest of free, open public debate on the one hand, and the protection of the reputation or honour of individuals deriving from human dignity on the other. The judicial practice on the limits of expressions regarding public figures shapes the freedom of public speech and the democratic public debate which are essential to the sustainability of democracy.⁴ The reason for the closer scrutiny of defamation cases is that the state can interfere most seriously in these freedoms through the criminal law. The role of the HCC in the developments of this judicial practice is crucially important, as it determines the constitutional principles and criteria used in the decision-making in such cases. The paper focuses on how the HCC's practice relates to its own case law on the limits of those expressions on public figures and the methods of judicial balancing in such cases through its decisions and argumentation in similar cases. Consequently, the aim is not to examine the frequency of the references to previous decisions but their substantive effects on the argumentation of the HCC.

First, I will introduce some general features of case-based reasoning in constitutional adjudication of the Kelsenian constitutional courts. After that, I will analyse the HCC's relevant case law in two parts: the abstract ex post review procedure and the constitutional complaint procedure. The distinction is appropriate for two reasons. The HCC developed the constitutional principles and measures of defamation cases based on the 1989 Constitution⁵ in the abstract ex

¹In this essay, I refer to the term constitutional courts in the sense of the specialized courts of the Kelsenian model.

²Halmi (2012), Groppi and Ponthoreau (2014).

³See, among others MacCormick, Summers and Goodhart (1997); Rosenfeld (2004); Jakab (2013); Florczak-Wątor (2022).

⁴Ash (2016) 183.

⁵Act XX of 1949 The Constitution of the Republic of Hungary. A non-official translation of the previous Constitution is available at [Link1](#).



post review procedure. After the new Fundamental Law⁶ came into force,⁷ the full constitutional complaint procedure became the main competence of the HCC and it has to apply the previously established abstract constitutional standards in concrete cases, while interpreting a new constitution.

2. CASED-BASED REASONING IN CONSTITUTIONAL ADJUDICATION

Case-based reasoning is an essential part of the common law tradition. The doctrine of precedent involves the application of the principle *stare decisis*, which means standing by cases already decided.⁸ Precedents provide reasons for the judicial decision. When determining the binding force of the precedent, there is a traditional distinction between those reasons within a case: the *ratio decidendi* and the *obiter dicta*. The binding part of a precedent is the *ratio decidendi*, meaning the ‘reasons for the decision’, and the *obiter dicta* is ‘saying by the way’, meaning the tangential observations provided by the judges in the case to reach the decision.⁹

However, precedents are not always followed. There are two techniques for departing from the precedent: *distinguishing* and *overruling*. Distinguishing means that the court find a material distinction between the previous decision and the case at hand that provides a sufficiently convincing reason for declining to apply a previous decision. When a court distinguishes between two cases, it determines that the later falls outside of the scope of the previous decision.¹⁰ When a court overrules a previous decision, it declares that it will not be applied in the future and a new ruling should be followed instead. The reasons for overruling must be especially serious and compelling. One of the most common reasons for overruling is that the past decision was demonstrably erroneous.¹¹ The other frequent reason for overruling a precedent is large scale societal, cultural and technical changes and developments.¹² Another reason to overrule a previous decision is that it is not applicable in a coherent way.¹³ The extent of the overruling can be full or partial. A partial overruling does not concern all of the rulings and arguments of the previous decision.

⁶The Fundamental Law of Hungary (25 April 2011). The official translation of the Fundamental Law incorporated all the Amendments is available at [Link2](#).

⁷The Fundamental Law and the related cardinal laws profoundly changed the constitutional system in Hungary, including the institutional structure and the competences of the HCC, and weakened the checking role and the independence of the HCC. This transformation is not the subject of this essay. See in detail Kovács and Tóth (2011); Kovács and Scheppele (2018); Chronowski et al. (2022); Szente (2023).

⁸Ingman (2006) 191–92.

⁹Duxbury (2008) 26, 67–68.

¹⁰Duxbury (2008) 113–16.

¹¹Duxbury (2008) 116–22.

¹²Sinclair (2007) 396–400.

¹³Gerhardt (1991) 109–10.



Case-based argumentation is also a standard methodology of constitutional adjudication,¹⁴ and accordingly in human rights adjudication. Constitutional courts of the Kelsenian model do not have an explicit obligation to adopt a deference to past constitutional decisions, but the common law methodology – without the explicit declaration of *stare decisis* – has appeared in their jurisprudence and they tend to follow their previous decisions which had precedential value.¹⁵ Previous decisions could be relevant if the constitutional court must interpret the same provisions of the constitution or the challenged legal norm, or the circumstances and legal issues of a concrete case are substantially similar to a previously decided case. Even though these precedents do not formally bind the constitutional courts, they can determine the argumentation and the ruling of constitutional cases. This does not mean that constitutional courts never depart from their previous decisions. They also use the methods of distinguishing and overruling which require persuasive justification.

However, the extent to which constitutional courts deem previous decisions as a source of their decision-making in a new case is not possible to determine, and often changes.¹⁶ Whether a decision or a series of decisions is considered a precedent by the constitutional court also varies. Constitutional courts frequently refer to their own case law in an abstract way, confirming and also developing constitutional standards. It is also a peculiarity that constitutional courts often invoke all the main relevant previous decisions in a given issue as a report of their own case law.¹⁷

As the interpretation of constitutional courts is universally binding, it is also a general requirement of the rule of law that constitutional courts should build a consistent and predictable practice and apply the existing principles and measures of their own previous decisions. The rule of law requires constitutional judges to exercise their power within a constraining framework and interpret the constitution based on public norms and standards to which the constitutional court they belong to has previously determined rather than on the basis of their own views. The rule of law requires relative stability in the legal system, but regarding judicial decision-making constancy has a particularly high significance.¹⁸ The consequence of ignoring constitutional precedents or the unreasonably frequent overruling of them would lead to a lack of certainty regarding the content of provisions of the constitution, such as constitutional principles, human rights etc.

Rational, coherent and predictable case law also enhances the legitimacy and the authority of the constitutional court. The public trusts in the impartiality and consistency of the jurisprudence of the constitutional court if it generally adheres to the constitutional principles and measures of its previous decisions.¹⁹

Beside ensuring stability in constitutional decision-making, courts also can develop, supplement or even correct the interpretation of the constitution by applying case-based reasoning. Case-based reasoning also improves the constitutional traditions and the legal culture. This type

¹⁴Gerhardt (2008) 147–49.

¹⁵Rosenfeld (2004) 637, 662.

¹⁶Gerhardt (1991) 114–15.

¹⁷Florczak-Wątor (2022) 256–60.

¹⁸Waldron (2012) 3, 23, 27–28.

¹⁹Gerhardt (1991) 77.



of argumentation enhances the national constitutional dialogue regarding constitutional interpretation and the content of the provisions of the constitution among the actors in constitutional matters, such as judges, leaders and members of public institutions, lawyers, interest groups, media, the wider society etc.²⁰

The HCC has also used case-based reasoning since its establishment.²¹ The judges of the constitutional courts change from time to time but the methods of case-based reasoning means that new constitutional judges are also committed to the previous case law of the HCC. Nevertheless, it is also a tendency that those constitutional courts packed with politically biased members which have lost their independence and authority try to turn away from their earlier case law and build a new jurisprudence.²² The HCC has been even obliged to undertake this kind of practice by the Fourth Amendment of the Fundamental Law²³ in 2013. The amendment added to the Fundamental Law that the decisions of the HCC issued before the entering into force of the Fundamental Law are null and void. The governing majority made it obvious that the expectation towards the HCC is to build new constitutional principles and standards based on the Fundamental Law, instead of referring to the principles and measures elaborated on the basis of the previous Constitution. Subsequently, the HCC accepted a new doctrine²⁴ regarding the applicability of its former decisions. According to this doctrine, the use of the arguments of decisions taken before the entry into force of the Fundamental Law must be justified in sufficient detail, and the provision of the Fundamental Law and the former Constitution and the context of the concrete case must be substantially similar. However, the HCC can also ignore the content of the previous decisions and reformulate the constitutional concepts even if the constitutional provisions have the same content.²⁵ Since then, the HCC have tried to make new leading decisions in constitutional issues motioned on the basis of the Fundamental Law, and at the same time, also listing the former related decisions ruled on the basis of the former Constitution, in order to maintain the pretence of constitutional consistency.²⁶ It is therefore appropriate to make a substantive analysis of the jurisprudence of the HCC instead of a numerical examination of references to previous decisions.

3. CRIMINAL LAW INTERFERENCE IN THE FREEDOM OF CRITICISM OF PUBLIC FIGURES

Freedom of expression and freedom of the press are fundamental values of constitutional democracies. The right to freedom of expression protects public communication, and the ability of

²⁰Gerhardt (2008) 155–57.

²¹For an overview of precedent-based adjudication in the HCC's jurisprudence, see D. Tóth (2009).

²²Florczak-Wątor (2022) 261.

²³Fourth Amendment to the Fundamental Law (25 March 2013).

²⁴Decision 13/2013. (VI. 17.) AB [31]-[32].

²⁵Pozsár-Szentmiklósy (2022) 110–11.

²⁶Tóth (2019).



individuals to express their views and opinions in public. Freedom of the press is closely related to and derives from freedom of expression, but is a distinct fundamental right that applies to the printed media, radio, television and other electronic media, as well as to media content on the Internet. Freedom of the press covers the establishment of media content providers, editorial freedom and the distribution of media content. The press is the most important instrument of expression and dissemination of information. In democratic states, one of the most important functions of the press is to check the government and to report on its activities in order to increase the transparency and accountability of the public authority. Because of this function, the press is often referred to as the ‘public watchdog’.²⁷

Democratic systems and democratic societies cannot function without freedom of expression and a free press. These rights make democratic public discourse and the free self-expression of individuals in society and their personal development possible. In this way, they ensure the participation of individuals in public discourse, allow them to control the activity of the state power, and protect them against state interference in their freedom of expression. The most extensive freedom of expression and a sustainable democratic society may materialise with the fulfilment of these objectives.²⁸

Although freedom of expression and of the press have such important roles in democratic societies, they are not absolute rights. However, these rights are entitled to special protection and restrictions on these rights can only be justified in a narrow range of cases and should only be permitted in relation to an equally important, high priority value. The protection of other fundamental rights and certain constitutional values and interests can be the basis for restrictions by the state.²⁹

Accordingly, the legal assessment of criticism of public figures is complex. In these cases, there is a collision between different human rights: freedom of expression and freedom of the press conflict with the right to reputation and honour that derives from human dignity. In most European countries, the legal protection of reputation is extensive and has a long history. However, freedom of expression and freedom of the press is essential to democratic public debate and to individuals’ participation in it. Based on this realisation, it has become a common constitutional principle that public figures must tolerate more criticism than other individuals regarding their public capacity.³⁰ In democratic states the aim is to try to find an appropriate balance between these rights. Defamation laws exist all over the world, and we know there are media laws in this regard too.

Traditionally, defamation is a civil law legal institution that aims to protect reputation.³¹ According to the traditional classification, defamation has two subcategories: libel and slander. Libel refers to written and visual defamation. Slander refers to oral defamation.

²⁷Barendt (2007) 417–27, Ash (2016) 119–22; 181–83.

²⁸For arguments for the protection of free speech and the press, see in more detail, Barendt (2007) 6–30, Ash (2016) 73–79.

²⁹Barendt (2007) 30–38.

³⁰Barendt (2007) 198–205.

³¹Barendt (1999); Kenyon (2007); McNamara (2007).



Nowadays, the term defamation is used in a broad sense in the legal systems and the academic literature covering both the civil law and the criminal law regulation on protection of reputation. In Hungary, the criminal law restrictions on freedom of expression and freedom of the press relevant to expressions about public figures are imposed by the provisions of the Criminal Code, namely, the criminal offences of ‘defamation’ and ‘insult’.³² In this study, I use the term defamation as the Hungarian criminal law does, meaning the criminal offence of the act of stating an allegation of fact suitable to harm one’s reputation.

The criminal law protection of reputation is the most severe state interference in the freedom of expression and press and has a chilling effect on those who want to participate in the public discourse and the media as they may prospect prosecution and penal sanctions. The prospective penal sanctions and the unpredictable sentence deter from publication even those publishers who believe they have a reasonable chance of acquittal.³³ For this reason, it is also a common European requirement that criminal law restriction should be applied decreasingly and with a special respect for proportionality.³⁴

In the cases of criticism of public figures, courts have to interpret the criminal law provisions with respect to the constitutional criteria and find a balance between the protection of reputation and the wider public interest to ensure free, democratic public discourse. As the HCC determines, builds and forms these constitutional standards, it has an important role in shaping the practice of the ordinary courts and the outcomes of their decisions.

³²Act C of 2012 on the Criminal Code

Defamation

Section 226

(1) ‘A person who, in front of another person, states, disseminates or uses an expression in direct reference to a fact that is capable of harming one’s reputation is guilty of a misdemeanour and shall be punished by imprisonment for up to one year.

(2) The punishment shall be imprisonment for up to two years if defamation is committed

- a) for a base reason or purpose,
- b) in front of a large audience, or
- c) by causing significant harm to interests.

Insult

Section 227

(1) A person who, apart from the acts specified in section 226, uses an expression that is capable of harming one’s reputation or commits any other such act

- a) with regard to the performance of the job, public mandate or public interest activity of the aggrieved party, or
- b) in front of a large audience is guilty of a misdemeanour and shall be punished by imprisonment for up to one year.

(2) A person who commits the criminal offence of insult through a physical act shall be punished under paragraph (1).’

The translation of the current Criminal Code is available at [Link3](#).

³³Barendt (2007) 118–19.

³⁴Compilation of Venice Commission Opinions and Reports Concerning Freedom of Expression and Media, CDL-PI(2020)008, Strasbourg, 7 July 2020. 43–46.



4. THE CASE LAW OF THE HUNGARIAN CONSTITUTIONAL COURT IN DEFAMATION CASES

4.1. Abstract ex post review procedures

The HCC examined the constitutional questions regarding expressions about public figures for the first time in 1994³⁵ concerning criminal regulation. In Decision 36/1994, the HCC annulled the regulation³⁶ that protected public figures from public criticism at a higher level than other individuals and introduced to the Hungarian constitutional practice the constitutional principle that public figures must tolerate more criticism than other individuals. It had great significance at that time, not long after the regime changed, in the evolution and the maintenance of the open democratic public debate in Hungary. The HCC stated that because of the significant role of freedom of expression and the press in a democratic society, these rights require special protection in relation to public matters, including the exercise of public authority and the activity of those who have public tasks or are in public roles. According to the HCC, individuals' possibility to publicly criticize the above-mentioned public figures and public authority, and to take part in an open democratic debate without uncertainty, compromise or fear, are outstanding constitutional interests.

³⁵Decision 36/1994 (VI. 24.) AB, available at [Link4](#).

³⁶Act IV of 1978 on the Criminal Code
Defamation of authorities or official persons
Section 232

“(1) Anyone who in front of another person states a fact, spreads a rumour or uses an expression directly referring to such a fact, capable of offending the honour of an official person or the honour of the authority through the defamation of the official person representing the authority is to be punished for the misdemeanour by imprisonment for up to two years, public labour or a fine.

(2) Anyone who, in relation to the operation of the authority or the official person, uses any expression or commits any act capable of offending the honour of an official person or the honour of the authority through the defamation of the official person representing the authority is to be punished according to paragraph (1).

(3) Anyone who commits the criminal offence specified in paragraphs (1) and (2) in front of a large public gathering is to be punished for the felony by imprisonment for up to three years.

(4) The perpetrator cannot be punished if the truth of the alleged fact has been proven. The proving of the truth is only allowed if the stating of the fact, the spreading of the rumour or the use of an expression directly referring to such a fact is justified by public interest or anyone's legal interest.

(5) A criminal proceeding on the grounds of the defamation of authorities or official persons can only be started on the basis of a report of the crime filed by the authority or person specified in a statute.’



In this decision the HCC defined the constitutional interpretation of defamation and insult³⁷ in connection with expressions about public figures. The HCC declared that in favour of the protection of the honour of public figures, the most severe tools of criminal law may only be applied constitutionally in the legal liability system in cases not covered by the scope of the freedom of expression. The HCC distinguished between allegations of facts and value judgments. It held that true statements of facts are protected by freedom of expression and the criminal law interference in the communication of them is unnecessary and disproportionate. However, false statements are not protected by free speech if the person who stated the fact knew that the statement was actually false or did not know of its falsehood because of her failure to pay the reasonable attention expected pursuant to the rules of her profession. According to the argumentation of the HCC, freedom of expression does not cover the falsification of facts, and this fundamental right can be exercised with a certain degree of responsibility by those who professionally participate in the shaping of public opinion. In this decision, the HCC remained silent regarding the burden of proof, which means that in the procedures of the Hungarian ordinary courts the speaker or the author must prove the truth of the statement.

The HCC stated that an expression of a value judgment expressed with regard to the public capacity of a public figure is constitutionally not punishable. The value judgments expressed in a public matter are highly protected by free speech and they can be excessive or even provocative. There is no such constitutional interest that would justify the criminal law interference in these value judgments in favour of the protection of public figures. According to the HCC, the only limit on the expression of a value judgment is the infringement of human dignity.³⁸

³⁷Act IV of 1978 on the Criminal Code

Defamation

Section 179

(1) ‘The person who states or rumours a fact suitable for impairing honour, or uses an expression directly referring to such a fact, about somebody, before somebody else, commits a misdemeanour, and shall be punishable with imprisonment of up to one year, labour in the public interest, or fine.

(2) The punishment shall be imprisonment of up to two years, if the defamation is committed

- a) for a base reason or purpose,
- b) in front of a large public,
- c) causing considerable injury of interest.

Insult

Section 180

(1) The person who, apart from the case of Section 179, uses an expression suitable for impairing honour or commits another act of such a type,

- a) in connection with the job, performance of public mandate or in connection with the activity of public concern of the injured party,
 - b) in front of a large public shall be punishable for a misdemeanour with imprisonment of up to one year, labour in the public interest, or fine.
- (2) The person who commits slander with assault, shall be punishable in accordance with subsection (1).’

A non-official translation of the previous Criminal Code is available at [Link5](#).

³⁸The question of in which circumstances the right to human dignity can limit freedom of expression also raises many questions in the practice of the HCC. However, the scope of this study does not cover these questions but the application of the methods of case-based reasoning regarding the developments of the constitutional standard of allegation of facts in criminal law defamation cases.



In this decision, the HCC had taken into account both the landmark decision of the U.S. Supreme Court in the *New York Times v. Sullivan*³⁹ case and the relevant case-law of the European Court of Human Rights. ('ECtHR')⁴⁰

In the abstract norm control procedure, the HCC had applied the technique of distinguishing in one case in 2004. In Decision 34/2004,⁴¹ the HCC held that a Member of Parliament has criminal liability only when stating knowingly false facts in a parliamentary debate. It defined a knowingly false statement of fact as a constitutional requirement for the waiver of the immunity of Members of Parliament. Consequently, Members of Parliament may say almost anything they like in parliamentary debate, except for knowingly false statements. The justification of this exception is that it ensures the autonomy of the legislative power. Members of Parliament contribute to the open debate in the legislature process and criminal liability would deter them from this. Accordingly, the HCC reaffirmed the standards of Decision 36/1994 that are applicable in public debate in general, and distinguished the case of parliamentary debate and the freedom of expression of Members of Parliament within it from that precedential decision, ensuring an even wider protection of expressions in parliamentary debate.

After the Fundamental Law came into effect, the second landmark decision in the ex post review procedure was delivered in 2014,⁴² in connection with civil law. In Decision 7/2014 regarding allegations of facts, the HCC reaffirmed and applied the measure of Decision 36/1994 to the civil law. The only difference is that in this case the HCC did not use the negligence test only on professional journalists; therefore we can conclude that regarding civil liability, it is applicable to everybody. As for value judgments, the HCC also followed the 36/1994 precedent and maintained the wide protection of freedom of expression and the press and justified it by the importance of democratic public debate. The HCC stated that those publicly expressed opinions which negate the human status of a person and thus infringe the non-restrictable aspect of human dignity, fall outside the protection of freedom of expression.⁴³

This decision is significant because it strengthened the principles and measures previously established on the basis of the previous Constitution after the new Fundamental Law came into force, and because it applied those to the civil law, too. Although this decision dealt with civil law regulation, the HCC always refers to its argumentation concerning the general principles even in criminal cases.⁴⁴

4.2. Constitutional complaint procedures

As was pointed out above, the HCC established the main doctrinal principles and measures of the limits of expression regarding public figures in the abstract ex post review procedure.

³⁹*New York Times v. Sullivan*, 376 U.S. 254 (1964).

⁴⁰*Sólyom (2000)* 12–13.

⁴¹Decision 34/2004. (IX. 28.) AB.

⁴²Decision 7/2014 (III. 7.) AB The summary of the decision is available at [Link6](#).

⁴³Decision 7/2014 (III. 7.) AB [49]-[50], [60]-[62].

⁴⁴See for example Decision 13/2014. (IV. 18.) AB [23], [25], [29], [31]-[32], [40], [51], Decision 3328/2017. (XII. 8) AB [30]-[34].



However, the application of these constitutional requirements is very complex and the judicial practice was still difficult to predict. In the constitutional complaint procedures,⁴⁵ the main question was how the HCC would apply the previously developed abstract principles and measures when it has to make a decision on concrete infringements of rights and determine constitutional criteria for the ordinary courts.⁴⁶

The HCC started to make decisions in the constitutional complaint procedure regarding criticism of public figures in 2014. As proceeding in this competence is a case-to-case type of decision-making, in order to ensure legal certainty, the significance of the application of the methods of case-based reasoning is even higher than in the abstract review procedures.

In Decision 13/2014⁴⁷ – the first relevant constitutional complaint procedure –, the HCC upheld the measures of the decision of 1994 regarding the distinction between statements of facts and value judgments and their consequences.⁴⁸ The HCC also complemented the constitutional examination with some criteria borrowed from the case law of the ECtHR. The HCC stated that in these cases the courts must first examine whether the expression was related to the public discourse or not. In the course of this examination the courts must consider the method, the circumstances, the topic and the context of the expression. Beyond these, they must evaluate the context, the style, the actuality and the purpose of the utterance.⁴⁹ After that, the courts must make a decision on whether the expression was an allegation of fact or a value judgment and apply the existing measures. The HCC reaffirmed that freedom of expression in public affairs is unrestricted in respect of facts which have been proven to be true, whereas freedom of expression in respect of false statements is only protected if the person making the statement did not know of the falsity and did not fail to exercise the diligence required by her profession. According to the HCC, such defamatory statements of fact fall within the statutory elements of defamation and are therefore punishable.⁵⁰

The HCC noted that the examination of the constitutional problem raised by the petitioner went beyond the scope of the individual case. Thus, the HCC disclosed that the system of criteria in the context of the specific case formulate general terms in accordance with the requirements of the Fundamental Law that could be applied by the ordinary courts in the future.⁵¹ This shows that the HCC realised that the constitutional criteria determined in the constitutional complaint procedure has a significant effect on the practice of the ordinary courts. The significance of this decision was that the HCC affirmed that the previously developed measures are applicable on

⁴⁵After the Fundamental Law and the new Constitutional Court Act [Act CLI] of 2011 on the Constitutional Court, available at [Link7](#), came into force, the full constitutional complaint procedure became the cardinal competence of the HCC. Instead of the constitutional review of the laws, the constitutional review of their judicial application came into focus.

⁴⁶It became a crucial question after the Fourth Amendment of the Fundamental Law came into effect. That amendment was an obvious message to the HCC from the governing majority to build new constitutional criteria based on the Fundamental Law, which has a more restrictive approach to the freedom of expression and press than the previous Constitution.

⁴⁷Decision 13/2014. (IV. 18.) AB.

⁴⁸Decision 13/2014. (IV. 18.) AB [31], [41].

⁴⁹Decision 13/2014. (IV. 18.) AB [39].

⁵⁰Decision 13/2014. (IV. 18.) AB [41].

⁵¹Decision 13/2014. (IV. 18.) AB [20], [38].



the basis of the Fundamental Law too.⁵² This decision became a landmark decision on the basis of the Fundamental Law which is always referred to by the HCC in the relevant cases.

At the end of 2017, there was a turn in the HCC's practice regarding the measures of statements of facts. In Decision 3328/2017⁵³ the HCC again examined the criminal liability for statements of facts regarding public figures and apparently overruled the negligence test of Decision 36/1994, stating that the speaker or the author can be punished for defamation only when she expressed a knowingly false statement. If she was negligent regarding the falsehood of the statement, the speaker or the author can no longer be punished. The HCC justified the overruling with the argument that the precedent was manifestly erroneous. It stated that its own previous case law had not paid attention to the elements of the legal regulation of defamation. The HCC stated that since neither the previous nor the current Criminal Code punishes the negligent form of defamation, the constitutional requirement related to the form of defamation that can be carried out negligently can no longer be upheld.⁵⁴ Another substantial consideration for overruling is the unworkability of the previous decision. This argument has also been used in this decision regarding the effects of the previous decisions on the practice of the ordinary courts. The HCC argued that because of the inconsistency between the statutory elements of the defamation and the previously declared constitutional requirements, the practice of the ordinary courts was also inconsistent regarding the application of the negligence measure.⁵⁵ The HCC also pointed out that the decriminalization of protected expression is a long-standing trend in Europe and the case law of the ECtHR.⁵⁶

The HCC also indicated that all the other elements of the criteria for decision-making regarding criticism of public figures – determined in the Decision 36/1994 and supplemented in Decision 13/2014 – remain unchanged and will continue to apply.⁵⁷

With this reviewed test the HCC could have provide a wider sphere for freedom of expression, more precisely freedom of the press, because the negligence test concerned professional journalists.

However, the status of the decision that overruled the negligence test is ambiguous. It seems that the HCC did not apply the reviewed test in subsequent cases, thus making its own jurisprudence unpredictable and confusing. The HCC never referred to the reviewed test or the overruling decision in further cases.

In some cases, the HCC refers in a general manner, as a report on the relevant precedential decisions to the original negligence test of Decision 36/1994 and Decision 13/2014, which upheld that without any reference to the reviewed test.⁵⁸

In one case the HCC declared constitutional such judgements of the ordinary courts that made their decisions on the basis of the original negligence test and established the criminal

⁵²Decision 13/2014. (IV. 18.) AB [42].

⁵³Decision 3328/2017. (XII. 8) AB.

⁵⁴Decision 3328/2017. (XII. 8) AB [63], [84].

⁵⁵Decision 3328/2017. (XII. 8) AB [68].

⁵⁶Decision 3328/2017. (XII. 8) AB [75]-[77].

⁵⁷Decision 3328/2017. (XII. 8) AB [80]-[83].

⁵⁸Decision 3263/2018 AB (VII. 20.) [33]-[37]; Decision 3357/2019. (XII. 16.) AB [29] The short summary of the decision is available at [Link8](#). Decision 3057/2022. (II. 11.) AB [57].



liability of a journalist and a civil rights defender.⁵⁹ The ordinary courts established the criminal liability of the authors of an article on the basis that they considered the statements as allegations of facts, and the authors were not successful in proving the truth of their statements. In this case, the HCC could have applied the new test regarding statements of facts and pointed out that a false statement of facts can only be the basis of criminal conviction if the author knew that the statement was not true. However, the HCC did not apply the new test, but quoted the original 36/1994 test, and without making the balancing on that basis, either. Another problem with this decision is that the article should have been evaluated as a whole. On this basis, the HCC could have determined the article as a value judgement based on facts that is protected by freedom of expression.

In another case, in which the ordinary courts established the criminal liability of the petitioner in defamation, the HCC examined the constitutional criteria regarding the criminal offence of insult. According to the HCC, the main question in this case was whether the expressions would insult, or not.⁶⁰ However, according to the decisions of the ordinary courts, the expressions challenged in the case were statements of facts. Consequently, the HCC should have examined whether they were true or false statements and applied the test it considers applicable to them. In this case the HCC also could have applied the new test regarding statements of facts and pointed out that a false statement of fact can only be the basis of criminal conviction if the author knew that the statement was not true. Or, if the HCC had considered that the ordinary courts were wrong with respect to the nature of the expression, it should have stated that obviously in the decision and made it clear what constitutional measure is applicable in the case and for what reason.

In a recent decision of 2022, the HCC even found it sufficient for the restriction of expression that it was a false statement of fact without any examination of the intention or the negligence of the speaker.⁶¹ In this case, the HCC did not consider its own constitutional standards because it should have pointed out that the mere falsity of the fact cannot be the basis of criminal liability. According to the HCC's new test, criminal liability can be established only if the speaker intentionally lied.

This approach to its own previous decision questions the weight of the partial overruling in 2017. From these decisions it seems that the HCC is intentionally avoiding the declaration of which test is applicable in defamation cases.

In precedent-based adjudication, courts sometimes use the technique of implicit overruling or overruling sub silentio, which means that the court suggest obliquely or by interference that a precedent may no longer be viable.⁶² From a 5 year perspective it is hard to find out whether the HCC is using this technique to overrule implicitly the reviewed test and to return the original test regarding the expression of false statements of facts concerning the public capacity of public figures.

Nevertheless, in order to clarify the applicable measure and through it the limits on freedom of expression and the press, the HCC should have reconsidered its recent decisions and disclosed

⁵⁹Decision 3357/2019. (XII. 16.) AB.

⁶⁰Decision 3465/2020. (XII. 22.) AB [35]-[39].

⁶¹Decision 3438/2022. (X. 28.) AB [25]-[27].

⁶²Gerhardt (1991) 77.



which measure is applicable in these cases. As the negligence test has been applied to professional journalists, this unpredictable case law has resulted in a practical restriction on the freedom of the press and endangered its fulfilment of its essential role as a public watchdog.

On 23 May 2023 an amendment⁶³ to the Criminal Code was enacted by Parliament that exempts the press from criminal liability for defamation and insult committed in the course of public debate, unless it intended to deny the victim's human dignity in a manifest and serious manner. As was stated in the official reasoning of the amendment, it aims to provide a wider sphere for the freedom of the press in the public debate and adopt the common European standards regarding the criminal law restrictions of those rights. At first glance, it seems that the amendment will resolve the unpredictable interpretation of the HCC regarding the criminal liability of the press in defamation cases. However, the manifest and serious harm to human dignity is an exception both in the case of defamation and insult. That means that if a publication will seriously harm human dignity, the criminal liability of the press can be established. This questions whether the amendment can actually achieve the wider freedom of the press in practice. The HCC's practice is not consistent as to which expressions can be classified as seriously offensive and denying human dignity, either. Although it has set out criteria for this assessment, the application of these criteria is also unpredictable.⁶⁴ As a consequence, in ordinary court proceedings, it may be uncertain which publications will fall into this category and be punishable. This kind of uncertain practice may have a chilling effect on the discussion of public affairs and lead to disproportionate restrictions on the freedom of the press. Another concern is that although the European standards referred to in the reasoning of the amendment consider the criminal restriction proportionate only exceptionally regarding both the freedom of the press and the freedom of expression in public debate, the amendment does not apply to freedom of expression. Therefore, the exercise of freedom of expression in public discussion can be restricted in Hungary by the criminal law, taking into account constitutional standards, but without any change.

5. CONCLUSION

In this paper, I have argued that case-based reasoning is not only an argumentation method of the constitutional courts but a measure of their jurisprudence. On the one hand, it is a general requirement of the rule of law to build a coherent, predictable jurisprudence regarding the content of the constitution. On the other hand, it is a practical and reasonable expectation to determine the constitutional criteria for the application of the ordinary courts.

In the second part of the paper, I analysed the case law of the HCC regarding criticism of public figures in defamation cases, using the methods of case-based reasoning as the measure for the examination. As the interference in the freedom of expression and press with the tools of the criminal law is the most severe approach and should be exceptional and justified by strong reasons, this measure is even stronger in these cases.

⁶³T/3755 amendment of Act of C 2012 on the Criminal Code, Available in Hungarian, [Link9](#).

⁶⁴See for example Decision 3263/2018 (VII. 20.) AB [33]-[37]; Decision 3057/2022. (II. 11.) AB [57]; Decision 3357/2019. (XII. 16.) AB; Decision 3465/2020. (XII. 22.) AB [35]-[39]; Decision 3438/2022. (X. 28.) AB [25]-[27].



The HCC developed the constitutional standards coherently in the abstract ex post review procedure. In the early period of the constitutional complaint procedure the HCC not just uphold but also complemented those standards. In 2017, there was a partial overruling regarding the negligence test of false statements of facts, which could have ensured a wider sphere for the freedom of the press. However, from the analysis of subsequent cases, it seems that the HCC ignores the overruling of the negligence test regarding the false statement of facts, causing uncertainties regarding the constitutional requirements. We can conclude that the decision which overruled the negligence test does not have weight in the recent case law of the HCC. Another concern is that in some recent cases the HCC not only keeps silent about the applicable test regarding false statements of facts but not even examined the consciousness of the author or the speaker regarding the falsity of the statements. Accordingly, there is no predictable pattern to the HCC's constitutional interpretation because it does not consistently follow the same approach in making such decisions. The recent amendment of the Criminal Code may resolve the question of the applicability of the negligence test but because of its vague terms it may enhance the uncertainties regarding the interpretation of human dignity in the case law of the HCC. Consequently, we cannot be sure that the HCC will ever adhere to its decisions granting a wider sphere for freedom expression and of the press and a more open public debate. Without the consistent application of constitutional criteria, the HCC is failing in ensuring the coherent constitutional standards for the ordinary courts and confusing the public, professional journalists, the ordinary courts, practicing lawyers and even the future judges of the HCC.

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