# Appendix 1: A Sample Judgment

## 1. The Decision 36/1994 (VI. 24.) AB

DECISION 36/1994 (VI. 24.) AB[1]

IN THE NAME OF THE REPUBLIC OF HUNGARY

In the matter of a petition seeking posterior examination of the unconstitutionality of a legal norm, the Constitutional Court – with dissenting opinions by Dr. Ödön Tersztyánszky and Dr. János Zlinszky Judges of the Constitutional Court – has made the following

decision:

1. The Constitutional Court holds that it is not in conflict with the Constitution to provide protection by means of the criminal law for the honour or reputation of authorities and official persons. The constitutionally unpunishable sphere of expression protected by the freedom of expression is, however, broader in relation to persons exercising public authority and politicians acting in public than as regards other persons.

2. The Constitutional Court holds that Section 232 of Act IV of 1978 on the Criminal Code (hereinafter: the CC) is unconstitutional and, therefore, annuls it as of the date of publication of this Decision.

3. For the purpose of Sections 179 and 180 of the CC, it is a constitutional requirement that the sphere of expression, constitutionally protected by the right to the freedom of expression, and thus unpunishable, is to be broader in relation to persons and institutions exercising public authority and politicians acting in public than as regards other persons.

An expression of a value judgement capable of offending the honour of an authority, an official person or a politician acting in public, and expressed with regard to his or her public capacity is not punishable under the Constitution; and an expression directly referring to such a fact is only punishable if the person who states a fact or spreads a rumour capable of offending one's honour or uses an expression directly referring to such a fact, knew the essence of his or her statement to be false or did not know about its falseness because of his or her failure to pay attention or exercise caution reasonably expected of him/her pursuant to the rules applicable to his or her profession or occupation, taking into account the subject matter, the medium and the addressee of the expression in question.

The Constitutional Court orders that the final judgments rendered in criminal proceedings conducted on the basis of Section 232 of the CC be reviewed if the convicted person has not yet been relieved of the unfavourable consequences of his conviction.

The Constitutional Court publishes its Decision in the Hungarian Official Gazette.

Reasoning

I

[1] Published in the Official Gazette (Magyar Közlöny) MK 1994/68. English translation downloaded from http://alkotmanybirosag.hu/letoltesek/en_0036_1994.pdf. With permission of the HCC.

1. Section 232 of the CC introduced by Section 52 of Act XVII of 1993, in force since 15 May 1993, contains the following provisions under the title "Defamation of authorities or official persons":

"(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."

According to Section 137 item 1 of the CC introduced by Section 34 para. (1) of Act XVII of 1993, in force since 15 May 1993, for the purpose of the CC "official persons are:
a) Members of Parliament;
b) the President of the Republic;
c) the Prime Minister;
d) Members of the Government, political secretaries of state;
e) constitutional judges, judges, prosecutors;
f) the Ombudsman for Civil Rights and the Ombudsman for the Rights of National and Ethnic Minorities;
g) members of the local governments' bodies;
h) notaries public;
i) persons serving at the Constitutional Court, the Courts, the Office of the Public Prosecutor, public administration authorities, the State Audit Office, the Office of the President of the Republic, and the Office of the Parliament if their activities are within the scope of regular operation of the authority concerned;
j) persons in charge of public authority or state administration duties at an organisation or body empowered by a statute with public authority or state administration tasks,".

The scope of persons entitled to report crimes necessary for launching criminal procedures is found in Section 20 para. (1) – as specified by Section 83 of Act XVII of 1993 – of Law Decree 5/1979 on putting into force and implementing the CC (hereinafter: Interpretation of the CC).

2. Several petitions were filed to review the constitutionality of Section 232 of the CC.

2.1. The petitioners requested the establishment of the unconstitutionality and the annulment of Section 232 of the CC as, in their opinions, the statutory provision violates the fundamental right to the freedom of expression specified in Article 61 para. (1) of the Constitution. The petitions point out in details why it is unnecessary to declare it a criminal act in addition to the statutory definitions of libel and defamation (Sections 179 and 180 of the CC); furthermore, why it can be used in a democratic state under the rule of law as a tool of the criminal law to punish the criticism related to the exercise of power. According to the petitioners, the statutory definition concerned violates Article 2 para. (1) (rule of law) and para. (3) (the obligation to combat any attempt to gain power with the use of force or to possess power on an exclusive basis), furthermore, Article 3 para. (2) (the role of the parties), Article 5 (protecting the freedom and power of the people), Article 60 para. (1)

(the freedom of thought, conscience and religion), Article 70 para. (4) (the right to participate in public affairs) and Article 70/A (the prohibition of discrimination) of the Constitution.

According to the petition filed after the amendment of Section 232 of the CC, the provision concerned would result in criminalising open debates to be held in public affairs thus restricting the right to express one's opinion and the freedom of the press to an extent unacceptable in a state under the rule of law, thus violating Article 61 paras (1) and (2) of the Constitution.

2.2. A private individual petitioner asked for the nullification of the second sentence of Section 232 para. (4) of the CC. In his opinion, setting a precondition for proving the truth violates Article 2 para. (1) (rule of law), Article 54 para. (1) (human dignity), Article 54 para. (2) (prohibition of torture or cruel, inhuman or degrading treatment), Article 57 para. (3) (right to defence), Article 59 para. (1) (right to the good standing of reputation), Article 61 para. (1) (freedom of expression), Article 64 (right to present a petition or complaint) and Article 8 para. (2) (prohibition to limit the essential content of a fundamental right) of the Constitution.

II

1. In examining the constitutionality of Section 232 of the CC, the Decisions of the Constitutional Court focused on the statements made in relation to human dignity and to the potential limitations of the freedom of expression.

1.1. The Constitutional Court expressed its opinion in two Decisions on the limitations to the freedom of expression by the tools of criminal law.

Decision 48/1991 (IX. 26.) AB on the criminal law protection of the person of the President of the Republic, the Constitutional Court established the following: “Upon the specific regulation of the protection of honour, the legislature may consider either to impose stricter penalty or to ensure more possibilities to the free criticism of the official activity of civil servants and those in public office. If the legislature established the enhanced protection of the honour and dignity of the President of the Republic, the Constitutional Court would warn to prevent restricting the essential content of the freedom of expression (Article 61 para (1)). As exercising the right to the freedom of expression is essential in a democratic society, it may only be restricted within constitutional limits. According to the practice of the Constitutional Court, the norms restricting a fundamental right must comply with the requirement of proportionality.” (ABH 1991, 206)

The last two statements of the decision are explained in detail in Decision 30/1992 (V. 26.) AB on the annulment of sanctioning the less severe form of incitement against community (ABH 1992, 167.).

According to the above decision, the State may only use the tool of restricting a fundamental right if it is the only way to secure the protection or the enforcement of another fundamental right or liberty or to protect another constitutional value. Therefore, it is not enough for the constitutionality of restricting the fundamental right to refer to the protection of another fundamental right, liberty or constitutional objective, but the requirement of proportionality must be complied with as well: the importance of the objective to be achieved must be proportionate to the restriction of the fundamental right concerned. In enacting a limitation, the legislator is bound to employ the most moderate means suitable for reaching the specified purpose. Restricting the content of a right arbitrarily, without a forcing cause is unconstitutional, just as doing so by using a restriction of disproportionate weight compared to the purported objective.

In addition to the right of the individual to the freedom of expression, Article 61 of the Constitution imposes the duty on the State to secure the conditions for the creation and maintenance of democratic public opinion. The objective, institutional aspect of the right to freedom of expression relates not only to the freedom of the press, freedom of education and so on, but also to that aspect of the system of institutions which places the freedom of expression, as a general value, among the other protected values. For this reason, the constitutional boundary of the freedom of expression must be drawn in such a way that

in addition to the person's individual right to the freedom of expression, the formation of public opinion, and its free development – being indispensable values for a democracy – are also considered. According to what has been said above, the right to the freedom of expression is not merely an individual fundamental right but also the recognition of the objective institutional aspect of that right, which means, at the same time, protecting public opinion as a fundamental political institution.

Although the privileged place accorded to the right of freedom of expression does not mean that this right may not be restricted – unlike the right to life or human dignity which are absolutely protected – but it necessarily implies that the right to free expression must only give way to a few rights; that is, the Acts of Parliament restricting this freedom must be strictly construed. The Acts of Parliament restricting the freedom of expression are to be assigned greater weight if they directly serve the realisation or protection of another individual fundamental right, a lesser weight if they protect such rights only indirectly through the mediation of an institution, and the least weight if they merely serve some abstract value as an end in itself.

The right to free expression protects opinion irrespective of the value or veracity of its content. The freedom of expression has only external boundaries: until and unless it clashes with such a constitutionally drawn external boundary, the opportunity and fact of the expression of opinion is protected, irrespective of its content. That is to say, it is individual expression of opinion, further the public opinion formed by its own rules, and, related to it, the opportunity of the formation of an individual's opinion built upon as broad a knowledge as possible, which are what the Constitution protects. The Constitution guarantees free communication – as individual behaviour or a public process – and the fundamental right to freedom of expression does not refer to the content of the opinion. 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.

In Decision 37/1992 (VI. 10.) AB, the Constitutional Court repeated its main statements on the right to the freedom of expression found in Decision 30/1992 (V. 26.) AB (ABH 1992, 227). In addition, the decision examined the freedom of expression in relation to the freedom of the press.

The State must guarantee the freedom of the press having regard to the fact that the press is the pre-eminent tool for disseminating and moulding views and for the gathering of information necessary for the formation of opinion. As the right to the freedom of press can be derived from the "mother right" to freedom of expression, the pre-eminent status conferred on the freedom of expression relates to the freedom of the press to the extent that it serves the former constitutional fundamental right.

The freedom of the press is primarily subject to external limits (which may also take the shape of special institutional features appropriate for the press' uniqueness, such as the criterion of "great publicity" [for incitement] in criminal law). Still, the freedom of the press is primarily guaranteed by the State's non-intervention regarding the content; this is assured, for instance, by the prohibition of censorship and the possibility of the free establishment of newspapers. With this self-restriction, the State makes it possible in principle for the whole spectrum of opinions existing in society, as well as all information of public interest, to appear in the press. But a democratic public opinion may only come about on the basis of objective and comprehensive dissemination of information.

2.2. The criminal law tools of protecting one's honour restrict the freedom of expression in order to protect the constitutional values of the right to human dignity and the right to have a good standing of reputation.

According to Article 54 of the Constitution, everyone has the inherent right to human dignity. Under the practice of the Constitutional Court – beginning from Decision 8/1990 (IV. 23.) AB (ABH 1990, 42) – the right to human dignity is considered a "general right of personality". The general right of personality is a "mother right", i.e. a subsidiary fundamental right which may be relied upon at any time by both the Constitutional Court and other courts for the protection of an individual's autonomy when none of the fundamental rights named are applicable for the particular facts of the case.

In its decision ordering the termination of death penalty (Decision 23/1990 (X. 31.) AB) as well as the concurring opinions attached to it, the Constitutional Court presented its opinion on human dignity in details. Although the rights to life and to human dignity were examined there together, the arguments found in the decision should be followed even as far as human dignity alone is concerned. Human dignity is an inherent, inviolable and inalienable fundamental right of all men (ABH 1990, 88).

2. The examination of the Constitutional Court included a comparative legal analysis covering the practice of the European Court of Human Rights as well.

Other democratic countries with continental legal systems also have specific tools of criminal law for the protection of the honour and the prestige of the State's institutions and officials. In the field of open debates on public affairs and in the relation between the freedom of expression, as a fundamental constitutional right, and the set measures restricting this right with the general criminal law rules of protecting one's honour or with specific statutory definitions, the tendency experienced in the European democratic countries shows the decreasing significance of criminal law measures and the growing importance of the freedom of expression. This is true in particular for the practical application of statutory definitions protecting the honour of the State and its institutions. The Constitutional Courts, reviewing the judgements of the courts in the framework of constitutional complaints, play an important role in the above process.

The decisions of the European Court of Human Rights adopted in the subject of violating Article 10 of the Convention on the Protection of Human Rights and Fundamental Freedoms have also significantly contributed to the limitation of criminal law restrictions on the freedom of expression. In numerous cases, the decision of the Court secured the protection of the freedom of expression contrary to the judgements of national courts, condemning the states for unnecessarily restricting the fundamental right with the tools of criminal law. Some important principles can be found in the decisions.

The decisions of the Court repeated the basic principle stating that pluralism, tolerance and openness are essential in a democratic society; the freedom of expression is a cornerstone and a precondition for the development of any democratic society. Such freedom is applicable also to the thoughts, information, theories and opinions that may be insulting or shocking or may cause anxiety.

The potential restrictions of the freedom of expression as specified in Article 10 item 2 must be interpreted in strict sense. The protection of the interests listed must be weighed together with the interest in having a free debate on political issues and they must be compared when deciding on whether or not the restriction concerned violates the Convention. In assessing the above, the Court applies the "test of necessity" formed in 1979 in the Case Sunday Times v. United Kingdom, examining whether the challenged restriction is necessary in a democratic society and whether the restriction applied is in proportion with the purported legitimate objective. According to the established practice of the Court, restricting the freedom of expression is disproportionate if it sets an unjustified barrier to criticising the government.

Punishing the conducts that offend the institutions and symbols of the State is not prohibited by the Court in general. However, in the opinion of the Court, the limits of acceptable criticism are wider regarding the government and the public authorities than in respect of politicians, and such limits are wider in case of all public actors than as far as private individuals are concerned. The government – taking into account its power status – must exercise self-restriction in using the tools of criminal liability, and in particular if there are other tools to respond to an illegal offence. In democracy, the acts or omissions of the government must be examined not only on the part of the legislature and the judiciary, but from the point of view of the press and the public opinion as well. Persons who undertake to act in public must also accept the higher level of attention paid to their acts and words by the press and the public opinion in a broader sense, and thus they must show greater patience regarding those who criticise them (Lingens v. Austria, Castells v. Spain, Oberschlick v. Austria, Thorgeirson v. Iceland etc.).

3. In forming its opinion, the Constitutional Court also took into account the dogmatic content of criminal law of Section 232 of the CC. Section 232 – especially after the amendment of the respective statutory definition – is in fact a special variation of the offences of libel and defamation, differentiated on the basis of the victim's person. To take this into account, in the

dogmatic analysis of a depth necessary for the evaluation of constitutional concerns, the Constitutional Court used the contents of the concepts formed in the penal jurisdiction and in the literature dealing with the criminal law tools of protecting honour.

Among personality rights, the statutory definitions of libel, defamation and the violation of piety offer general criminal law protection for honour and the good standing of one's reputation (Sections 179 and 180 of the CC). Although they are classified as offences against human dignity, according to the continuous practice of the Hungarian penal jurisdiction, protection against the conducts offending the positive value judgement and the honour paid by the society must be enjoyed not only by individual persons but also by legal entities and bodies corporate that represent collective social commitments.

3.1. The defamation of authorities and official persons are traditionally punishable offences in the Hungarian criminal law. Until putting into force Act V of 1961, the offence had been classified as a special case of libel and defamation with more severe punishment. It was Act V of 1961 that specified for the first time the statutory definition of the defamation of authorities or official persons among the offences offending or endangering State activities and the implementation of State duties, and with minor amendments it was in force until 15 May 1993. According to the reasoning on Section 52, Act XVII of 1993 limited the scope of activities covered by the defamation of authorities or official persons as compared to the provisions previously in force. As it was justified, "the criminal liability for stating facts and using expressions that may weaken the trust in the authorities or defame their honour disproportionately restricts the freedom of expression. Therefore the Proposal does not allow the punishment of such conducts."

Together with modifying the conducts constituting the offence specified in Section 232 of the CC, the penal sanctions were made more severe, too. Following the amendment of the statutory definition, according to the reasoning of the Act XVII of 1993, "regulating the defamation of authorities or official persons as a separate offence is only justified if the perpetrator has to face more severe statutory sanctions than in case of libel or defamation. Therefore, the Proposal raises the upper limit of the applicable criminal sanction in both in the standard and the qualified case."

3.2. The unchanged position of the offence in the structure of the Act reflects the fact that amending the statutory definition in Section 232 of the CC by limiting the scope of criminal liability did not result in changing the legal subject primarily protected; protecting honour falls in the scope of protecting the operation of the authority rather than protecting human dignity. Thus, protection of the honour of authorities and official persons still serves the purpose of protecting the honour of public authority and the trust needed for its operation. Raising the original level of the sanctions that had corresponded to the sanctions of libel and defamation made it clear that, in the opinion of the legislature, conducts contrary to the requirements offend not only the honour of authorities or the honour and the human dignity of official persons, but they offend or endanger the statutory order of performing public duties and the operation of authorities, too.

3.3. The conducts constituting the offence are as follows: stating, in front of another person, a fact, spreading a rumour or using an expression directly referring to such a fact objectively capable of offending honour (hereinafter: "communication of facts"), or using an expression or committing an act objectively capable of diminishing honour (hereinafter: "value judgement").

Such an offence can only be committed intentionally; committing it in a negligent way is not punished by the law. To establish intentionality, it is necessary for the perpetrator to be aware of the following elements: the communication of facts or the value judgement is made in front of others, it is related to an official person or an official person representing an authority, and it is objectively capable of diminishing the honour of the official person or that of the authority by the defamation of the person concerned. Although criminal liability may be established without the existence of a purported aim of defamation, the motivation of the conduct may be taken into account in determining the penal sanction to be applied.

In examining the constitutionality of the criminal law regulation it is important that the falseness of the communicated fact capable of defamation is not an element of the statutory definition of the offence, thus the communication of either a true or a false fact may constitute a criminal act. Being aware of the falseness of the fact is a precondition of criminal accountability,

and therefore being mistaken concerning the truth of the fact has no relevance in criminal law. Similarly, the perpetrator's acting in "good or bad faith", and his/her carefulness or carelessness in verifying the truth or falseness of the fact communicated have no relevance concerning the realisation of the offence. Neither due circumspection, nor an error made in "good faith" may relieve the perpetrator from criminal liability.

Neither the truth of the fact alone, nor the public interest or an acceptable motivation of communicating the fact excludes the unlawfulness of the conduct. Section 232 (similar to Section 179) of the CC reflects the principle that the freedom of communicating facts does not include in general the facts objectively capable of defamation even if they are true; it is prohibited in the criminal law to communicate true facts capable of defaming the honour of authorities or official persons. The communication of such facts construes an offence independently from the perpetrator's purpose and motivation.

It is accepted in criminal law that a positive purpose or an acceptable motivation (public interest or legal private interest) of communicating true facts may render the punishment unjustified. However, the purpose and the motivation have only an indirect effect on the perpetrator's accountability through the decision to be made by the authority on allowing verification as to whether the facts prove to be true. The cause excluding criminal accountability regulated in Section 234 para. (4) (and in Section 182 in respect of libel), namely the institution of verifying the truth has always played the role of forming a counterweight against the prohibition in criminal law of communicating true facts capable of defamation in exceptional cases when the communication of such facts is justified by public interest or the legal interest of any private person.

III

The petitions aimed at establishing the unconstitutionality of Section 232 of the CC are well founded.

In assessing the constitutionality of Section 232 of the CC, the Constitutional Court applied the same "test of necessity" as in Decision 30/1992 (V. 26.) AB (ABH 1992, 172) in the case of incitement against community. Accordingly, it examined whether it was unavoidably necessary to restrict the freedom of expression and the freedom of the press regarding the conducts specified in the statutory definition, and whether such restriction complied with the requirement of proportionality, namely whether the set of tools of criminal law were necessary and adequate for the aim to be achieved both in general terms and in respect of the criminal statute definition concerned. In this respect, the Constitutional Court examined the institution of verifying the truth as well. As in case Section 232 of the CC is annulled, the criminal law protection of the honour of authorities and official persons is secured through the statutory definitions of libel and defamation, the Constitutional Court – taking into account the strong relationship between the above mentioned legal institutions – extended its review to Sections 179 and 180 of the CC as well, to the extent of forming an opinion on the constitutional requirements of applying these provisions criminal law, too.

According to the Constitutional Court, Section 232 of the CC is unconstitutional, as
- it punishes libel and defamation if the victim is acting in a public authority capacity in the same scope as in the case of other victimised persons, which is clearly contrary to the principles represented in the established practice of the European Court of Human Rights;
- in public affairs, it orders the punishment of expressing opinions that represent value judgements, which is an unnecessary and disproportionate restriction of the constitutional fundamental right;
- regarding the communication of facts, it does not differentiate between true and false statements, and in the latter case, between intentionally false ones and those that are false because of a negligence in the form of not complying with the rules of a profession or occupation, although only in case of the latter ones may the freedom of expression be constitutionally restricted by means of criminal law tools.

1. The Constitutional Court assessed, on the one hand, the potentials of the orienting role to be played by criminal law in the field of establishing and developing trust in the institutions characteristic to the constitutional structure of a democratic state under the rule of law and, on the other hand, the negative effects, experienced in history, of protecting public authority by

means of criminal law, as well as the harmful consequences of restricting the freedom of expression and the freedom of the press in matters of public interest by means of extinguishing criticism, together with the advantages that can be gained in a democratic society from the freedom of expression, individual participation in forming the public will, and the free criticism of the operation of public bodies as well as the open social control of their operation.

It follows from the positions taken so far by the Constitutional Court on the constitutional value of the freedom of expression and the freedom of the press as well as the significant roles they fulfil in the life of a democratic society that this freedom requires special protection when it relates to public matters, the exercise of public authority, and the activity of persons with public tasks or in public roles. In the case of the protection of persons taking part in the exercise of public authority, a narrower restriction on the freedom of expression corresponds to the constitutional requirements of a democratic state under the rule of law. Open discussion of public affairs is a requisite for the existence and development of a democratic society which presupposes the expression of different political views and opinions and the criticism of the operation of public authority. As the experience of societies with democratic traditions shows, in these debates governments and officials are attacked by unpleasant, sharp and possibly unjust accusations, and facts are revealed to the public which are capable of offending the honour of public actors.

According to the position of the Constitutional Court, the possibility of publicly criticising the activity of bodies and persons fulfilling state and local government tasks, furthermore, the fact that citizens may participate in political and social processes without uncertainty, compromise and fear is an outstanding constitutional interest. The contrary is served when legislation threatens with criminal punishment every statement of fact and value judgement capable of offending the honour of persons and institutions exercising public authority.

The legal tools of protecting honour can be found in several branches of the legal system in force, such as criminal law, the law of administrative infractions and civil law. As human dignity plays a very important role, criminal law can, in general, be considered a final tool in the system of legal liability as a non-excessive form of reaction to conducts that defame the individual’s honour.

After the promulgation of the European Convention on Human Rights by Act XXXI of 1993, the Constitutional Court maintains its statements contained in Decision 48/1991 (IX. 26.) AB (ABH 1991, 206) in concordance with the statements made in the present decision, in order to secure harmony between the practice of the European Court of Human Rights and the internal legislation. It follows from the outstanding constitutional value of the freedom of expression and of the press relating to public matters that it is unconstitutional if the State threatens with more severe punishment the person who expresses an opinion on the operation of an authority or an official person, however offending it should be, than the person who expresses his or her unfavourable opinion of a private person. In the face of the constitutional right to free criticism of the official activity of civil servants and those in public office and the freedom of expression related thereto, the extensive criminal law protection granted to authorities and official persons constitutes an unnecessary and, in relation to the desired goal, disproportionate restriction on a fundamental right.

2. The protection of the honour of an official person is an aspect of the inalienable and unrestrictable right to human dignity. Although Article 59 para. (1) of the Constitution names only the right to the good standing of one’s reputation among the fundamental rights related to the society’s value judgement about the person, it is evident that honour is a protected fundamental right as well on the basis of the right to human dignity as its mother right regulated in Article 54 of the Constitution. Although human dignity applies only to official persons representing an authority, the authority itself can also claim the favourable appreciation and honour of society.

On the basis of evaluating the constitutional protection of human dignity, honour, and the right to one’s good standing of reputation as well as the right to freely express one’s opinion together with the constitutional interest in freely debating public matters and the interrelation between the above, the Constitutional Court established that the freedom of expression may only be limited to a less extent in the protection of those who exercise public authority. In the protection of the honour of

authorities and official persons, the most severe tools of criminal law may only be applied constitutionally in the legal liability system in cases not covered by the liberty of the freedom of expression.

In the wording related to the freedom of expression, the Constitution does not explicitly differentiate between statements of facts and value judgements. It is the basic objective of the freedom of expression to allow a chance for the individual to form others' opinions and convince others about his/her own opinion. Therefore, in general, the freedom of expression includes the freedom of all kinds of communication independently from the way or the value, moral quality and, in most cases, the content of truth of the communication concerned. Even the communication of a fact alone may be considered an opinion, since the circumstances of the communication itself may reflect an opinion, and thus the constitutional fundamental right to the freedom of expression is not limited to value judgements. Nevertheless, it is well justified to distinguish between value judgements and statements of facts when setting bounds to the freedom of expression.

Value judgement, i.e. somebody's personal opinion is always covered by the freedom of expression, regardless of its value, truth and emotional or rational basis. However, human dignity, honour and reputation, likewise constitutionally protected, may constitute the outer limit of the freedom of expression realised in value judgements, and the enforcement of criminal liability in the protection of human dignity, honour and reputation may not be generally considered disproportionate, and thus unconstitutional.

According to the position of the Constitutional Court, however, value judgements expressed in the conflict of opinions on public matters enjoy increased constitutional protection even if they are exaggerated and intensified. In a democratic State under the rule of law, the free criticism of the institutions of the State and of the local governments – even if done in the form of defaming value judgements – is a fundamental right of the citizens, i.e. the members of the society, which is an essential element of democracy. Even in the period of the establishment and consolidation of the institutional structure of democracy – when civilised debating of public matters has not yet taken root – there is no constitutional interest which would justify the restriction of communicating value judgements in the protection of authorities and official persons. The protection of the peace and democratic development of society does not require criminal law interference against the criticism and negative judgements of the activity and operation of authorities and official persons even if they are in the form of libellous and slanderous expressions and behaviour. The position taken in Decision 30/1992 (V.26) AB applies here too: it is a paternalistic approach to shape public opinion and political style by means of criminal law punishments (ABH 1992, 180).

The freedom of expression is not so unconditional with respect to statements of facts. According to the position of the Constitutional Court, the freedom of expression does not extend to the communication of false facts capable of offending honour if the communicating person is explicitly aware of the falseness of the statement (intentionally false statement) or if, according to the rules of his/her occupation or profession, it could have been expected of him/her to examine the truth of the fact but she/he failed to pay the due care required by the responsible exercise of the fundamental right to the freedom of expression. The freedom of expression involves only the freedom of judgement, characterisation, opinion and criticism; constitutional protection shall not apply to the falsification of facts. Furthermore, the freedom of expression is a constitutional fundamental right that may only be exercised with responsibility, and in the interest of avoiding the communication of false facts it involves certain liabilities for those shaping public opinion by profession.

However, the freedom of expression also covers the communication of true facts and information capable of defamation, and the protection of human dignity, honour and a good standing of one's reputation may be used as an external limitation on such liberty. Applying the means of criminal law in the protection of these constitutional fundamental rights is, however, unnecessary and disproportionate in the case of institutions and official persons exercising public authority. Nevertheless, in connection with statements not related to their public capacity, official persons are entitled to the same protection as private persons.

Section 232 of the CC does not comply with the constitutional requirements expounded above. The statutory definition is too broad and restricts the freedom of expression even in respect of conducts where such restriction affects the essential content of this fundamental right, and thus it violates the prohibition expressed in Article 8 para. (2) of the Constitution.

3. Upon the nullification of Section 232 of the CC, the protection of the honour of authorities and official persons is taken over by Sections 179 and 180 of the CC. The position of the Constitutional Court stating that - due to the high constitutional value of the freedom of expression in public matters - the protection of the honour of authorities and public officials as well as other public actors may justify less restriction on the freedom of expression than the protection of the honour of private persons is applicable with respect to these statutory definitions as well. It is in this spirit that Point 3 of the operative clause of the present Decision marks out the boundaries of constitutional application of defamation.

It is the task of the legislature to define the scope of public actors in whose cases exercising the freedom of expression excludes the unlawfulness of the conduct, and to specify the criteria of establishing negligence in respect of those whose occupation is related to forming public opinion.

4. In the opinion of the Constitutional Court, allowing verification of the truth does not eliminate the unconstitutionality of the statutory definition. The provisions of criminal law are founded on the presumption of falseness. This would reasonably deter individuals from criticising the actors of public life, detaining them from communicating even true facts or facts believed to be true. It depends on the discretion of the authority in charge whether the person subject to criminal proceedings has a chance to prove the truth in the course of such procedure, and convincing the authorities on the truth of the facts is uncertain. Allowing verification of the truth does not counterweight the unnecessary and disproportionate restriction of the freedom of expression and of the press, moreover, it does not substitute for constitutional protection in case of communicating true facts, or ones reasonably believed to be true, capable of defaming the honour of an official person.

Proving the truth results in reversing the general rule of proof, i.e. the presumption of innocence that follows from the constitutional principle of criminal proceedings, and thus the burden of proof lies with the person subject to the proceedings. The perpetrator’s criminal accountability is only excluded if the truth is proved. If the authority in charge is not convinced about the truth of the content of the facts stated, the perpetrator’s guilt must be established. If the truth of the facts cannot be proved it is taken to the account of the person subject to the proceedings, and in this respect the presumption of innocence is not applied. In the opinion of the Constitutional Court, allowing the use of the truth by the defence under the burden of proof prohibits not only the communication of consciously false statements but it can also deter from criticising the activity of those who exercise public authority.

There are statutory preconditions for proving the truth and it is in the discretion of the authority to allow it. According to the Constitutional Court, specifying this precondition in Section 232 para. (4) and Section 182 para. (2) of the CC unconstitutionally restricts proving the truth. Revealing true facts concerning persons exercising public authority and public actors should always be considered to be of public interest even if the facts in question are capable of impairing the honour of such persons; in this respect, discretion may not be granted to the authorities conducting criminal proceedings.

5. As at the request of the official person defamed, reporting the crime may not be rejected (Section 20 of the Interpretation of the CC), there is no constitutional concern about the legislature’s linking the institution of proceedings to reporting the crime by the head of the authority or other organisation in case of a libel or defamation of an official person. Although the content of Section 232 para. (5) of the CC is not unconstitutional, it is affected by the nullification as well. The nullification of the statutory definitions of criminal offences results in leaving this rule without a basic provision.

There is no constitutional concern about making a difference in assessing the criminal offences committed against official persons and non-official persons, i.e. maintaining in such cases public charges in criminal proceedings. Annulling Section 232 of the CC does not result in demanding specific regulations of criminal proceedings, as libel and defamation are only subject to private accusation if the perpetrator is to be punished on the basis of a private complaint.

6. Ordering the review of final judgments rendered in criminal proceedings is based upon Section 43 para. (3) of Act XXXII of 1989.

Budapest, 22 June 1994

Dr. László Sólyom
President of the Constitutional Court

Dr. Antal Ádám
Judge of the Constitutional Court

Dr. Géza Kilényi
Judge of the Constitutional Court

Dr. Tamás Lábady
presenting Judge of the Constitutional Court

Dr. Péter Schmidt
Judge of the Constitutional Court

Dr. András Szabó
presenting Judge of the Constitutional Court

Dr. Ödön Tersztyánszky
Judge of the Constitutional Court

Dr. Imre Vörös
Judge of the Constitutional Court

Dr. János Zlinszky
Judge of the Constitutional Court

Dissenting opinion by Dr. Ödön Tersztyánszky, Judge of the Constitutional Court

1.
I agree with Point 1 and the first paragraph of Point 3 of the holdings but I disagree with the annulment of Section 232 of the CC and with paragraph 2 of Point 3 of the holdings. In my opinion, the petition should have been rejected.

Section 232 para. (1) of the CC is the aggravated case of libel, while paragraph (2) thereof is the aggravated case of defamation, with both based on the identity of the injured person. In case of libel and defamation, the attack on the honour of another person is to be punished. In its Decision 48/1991 (IX. 26.) AB, the Constitutional Court established that the special criminal law protection [of the President of the Republic] may cover honour and the good standing of reputation as well, and the specific feature of protection may be represented by the severity of punishment or the official prosecution of crimes that are in general punishable on the basis of a private complaint only.

The above statement is maintained in the majority opinion in a modified form in order to secure harmony between the promulgation of the European Convention on Human Rights hereinafter: the Convention), the internal law and the practice of the European Court of Human Rights (hereinafter: the Court).This Court did, in fact, interpret Article 10 of the Convention in several cases, which means however that in the states complained against (e.g. England, Spain, and Iceland), there are statutes the application of which in a specific case might have violated the Convention under particular circumstances and facts of the case.

In this respect, one may not disregard the remark made by the Minister of Justice referring to the fact that Section 116 of the Austrian Criminal Code orders the punishment of defaming in public any constitutional body of representatives, the federal army or an authority; the Criminal Code of Germany contains separate statutory definitions applicable to the defamation of constitutional institutions and the federal president. Even in the Anglo-Saxon legal system, the honour of the authorities enjoys enhanced protection (contempt of court).

2.
The states parties to the Convention must provide in their internal laws the rights specified in the Convention. In other words, the Convention and the Hungarian law must be in harmony. The case law of the Court has a great impact on the content of the Convention, just as the practice of Hungarian courts has a significant influence on the content of the Hungarian law. It is the task of those who apply the law to harmonise the practice of the Court and that of the Hungarian courts. The

Constitutional Court may have a role to play in harmonising the Convention and the internal law if the statutes violate the international treaty.

The individual complaints dealt with by the Court are always related to the alleged violation of the Convention in a given case rather than to the harmonisation of the Convention with the law in force in the country concerned. No consequence may be drawn from the practice of the Court alone concerning the harmony of the Convention and the internal law. Undoubtedly, the application of a statute not being in line with the Convention would result in violating the Convention. The importance of harmony between the internal law and the Convention is only indirectly related to the case law of the Court.

The Convention contains the right to privacy (Article 8). According to the decision of the Parliamentary Assembly of the Council of Europe, it contains "the protection of moral integrity, honour and the good standing of reputation, the right of not to be put into a false light and irrelevant or annoying facts about us should not be communicated".

The right to the freedom of expression may conflict with the enforcement of the fundamental rights of persons provided for by the Constitution, such as the rights to human dignity, to good reputation or to the protection of personal secrets. It may and should be decided only case by case, having carefully examined the facts of the case, which interest is more important.

3.
Official persons and public actors must bear strong criticism in certain cases: the scope of constitutionally not punishable expression of opinion and statement of facts is wider in their respect as compared to other persons. However, it is not excluded by the Constitution to impose more severe punishment in case the limited scope of the criminal law protection of official persons and public actors is offended.

Defining the sphere of constitutionally unpunishable expression of opinion and facts is a matter of application of the law, i.e. the task of courts proceeding in the individual cases. The Constitutional Court is not authorised to examine the constitutionality of decisions in application of the law. This reason is, however, not enough to nullify statutes that might be applied unconstitutionally.

As far as the trends in the practice of the courts is concerned, it is worth noting a judgement of the Supreme Court passed in a particular case published as a directive under No 300 in the Court Reports 1994/6. It establishes that the jurisdictional practice based on Act XLI of 1914 on the Protection of Honour has been consistent up to the present day in the respect of the fact that "the factual content of truth of a judgement, criticism or an expression of opinion does not fit into the concept of "statement of facts" in criminal proceedings and, therefore, neither libel nor defamation can be based upon a statement containing it". According to the judicial practice, judgements, criticism and the expression of opinion are free. Of course, there are limits on criticism; it must not go as far as using slanderous expressions offending the human dignity of the person judged and it must not contain defaming statements beyond the extent absolutely necessary for the criticism. The judicial practice is consistent in respect of interpreting the "capability to defame honour", as an element of the statutory definition of the offence, based on an objective value judgement by the society rather than on the subjective opinion of the person criticised. This element of the statutory definition still obliges the courts to examine whether in the particular case the expression of opinion went beyond the threshold of tolerance relevant to criminal liability in respect of the individual persons offended.

As a result, the provisions in Sections 179, 180 and 232 of the CC, as far as their interpreted and applied contents are concerned, are suitable for being used by ordinary courts in concrete cases to solve in a constitutional way any collision of constitutional values, having regard also to the fact that a wider scope of unpunishable expression of opinions is allowed in respect of public actors.

4.

I do not agree with the majority opinion establishing that in case of an offended official person or public actor, the truth of the defaming statement should be presumed; nor do I agree with establishing the unconstitutionality of setting a precondition for the verification of the truth in the reviewed scope.

In general, the one who makes a statement must prove its truthfulness. Negative facts cannot, in theory, be proven. The burden of an unsuccessful verification of the truth shall lie with the perpetrator, while the presumption of "innocence" is applicable in respect of the person "accused" by him/her. The roles of the accused and of the injured party may not be switched in the course of criminal proceedings.

As far as the necessary certainty of verifying the truth is concerned, it is worth noting that according to the judicial practice of assessing whether a specific statement of facts is true or false, it is not absolutely necessary to have a complete concurrence of the facts stated and the ones proved. The verification of the truth is considered successful if at least the essence of the statement of facts proves to be true (Court Reports 1975/11, 498).

Proving the truth excludes criminal accountability. The law offers a wide scale of possibilities and obligations to prove the truth. The legal interest of anyone (not only that of the person stating the facts concerned) is sufficient. There is only one restriction as expressed by the word "legal": mere self-interest is not enough, it must be an interest protected and acknowledged by the law.

The verification of the truth cannot be ex lege allowed in every case as in such a circumstance the statutory definitions would not protect the human dignity and the privacy of persons, for example, against the arbitrary, vicious and sensation-seeking communication of family or private secrets, or against mere vituperation.

As noted by the Minister of Justice, too, several foreign examples can be referred to in the field of restricting the verification of the truth. For example, Section 173 para. 3 of the Swiss Criminal Code restricts the verification of the truth with a content quite similar to the respective Hungarian legal provisions. According to Section 112 of the Austrian Criminal Code, the truth and acting in good faith may only be proved if the perpetrator refers to the truth of his/her statement or to his/her acting in good faith; the verification of the truth or acting in good faith is not allowed in respect of facts related to private or family life as well as in terms of offences that may only be prosecuted at the request of third persons.

Ordinary courts may use the present system of verifying the truth to adopt constitutional judgements on whether a certain statement is considered a free expression of opinion or an act dangerous to the society and injurious to privacy. The content of "public interest" and the legal interest of anyone" is formed in the ordinary judicial practice: the closer the scope of life situations related to the statement of facts is to public to life, the wider the scale of protection of public interests and legal private interests based on which the truth may be communicated; and the closer the statement of facts is to private life, the more the possibility to prove the truth is limited.

5.
In the Hungarian law, the fulfilment of any statutory definition found in the part of the CC listing offences is only deemed to be a criminal offence if it is dangerous to the society. Declaring any conduct to be a crime in a certain case and assessing its dangerousness to society is the task of the independent courts. Being aware of the falseness of the fact and an error concerning the truthfulness of the fact stated are not relevant in criminal law according to Section 27 para. (1) of the CC. However, Section 27 para. (2) of the CC provides that one may not be punished according to the law in force if he/she committed the conduct in the well-founded erroneous assumption that it is not dangerous to society. Based on the judicial practice, it can happen that, for example, in case of a libel committed in the press, the journalist can successfully refer to a well-founded error in respect of a statement subsequently proved to be false (Court Reports 3049, Criminal Cases 1970-73, 6437).

Budapest, 21 June 1994

Dr. Ödön Tersztyánszky

Judge of the Constitutional Court

I second the above dissenting opinion.

Dr. János Zlinszky
Judge of the Constitutional Court

Constitutional Court file number: 1127/B/1992

## 2. Explanation

The judgment concerned the critique of public figures, a classic topic of the freedom of expression, one of our sample of forty judgments. The very first part of the judgment is the case identification number (the ordinal number of publication in the Official Gazette: it was the 36th judgment published in the Official Gazette in 1994), date of when the judgment was published in the Official Gazette (24 June). The Constitutional Court file number was only published at the very end of the judgment.

The judgment was declared "In the Name of the Republic of Hungary", followed by the *ratio decidendi* of the case and the statement of the concrete decision (about the annulment of the statute or a concrete order, like here the revision of criminal procedures).

In the first part of the Reasoning (marked with Roman 'I'), the statutes concerned are quoted and the petitions are summarised (the names of the petitioners are not public and remain unpublished). In later parts (II and III), the actual reasoning takes place. The procedural background is not discussed, only shortly mentioned (in Part I), as the procedure was launched by *actio popularis*. The legal issue is abstractly stated (the whole case is an abstract review of constitutionality, with no concrete legal dispute behind it), and then abstractly analysed. In the reasoning, hardly any facts are mentioned: only in Part I, and even there, not only facts are mentioned but rather arguments of the petitions repeated. The only facts which are mentioned are basically the facts concerning the submission of petitions. The judgment works with chain-structure arguments (31 out of the 40 judgments do so), it refers to precedents, it uses objective teleological, harmonising arguments (also references to international law) and comparative law arguments. As to the substantive features, it justifies the decisions with 'the rule of law', 'democracy', 'proportionality', 'human dignity' and 'freedom of expression'.

The names of the judges are noted at the end (also the *juge rapporteur* or 'presenting judge' is noted). One dissenting opinion (with the name of the dissenter and of the judge who joined him) is attached (25 out of the 40 judgments contain a separate opinion) which only contains the points of disagreement (and refers to the respective parts of majority opinion), but it could not stand on its own as a judgment.

Its length is slightly (19%) under the average (48975 'n'-s, instead of 60414), but those judgments which are nearer in length to the average do not show the other typical features.