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The Collision between Freedom of Expression and Human Dignity in the Jurisprudence of the Hungarian Constitutional Court – The Protection of Public Speech from Public Figures to Public Affairs[1]

Freedom of expression – among the classical freedom rights – became an integral part of European legal culture in the 16th century, in parallel with the emergence of Protestant denominations. The definition of the limits to freedom of expression within the framework of the rule of law has been a topical issue of jurisprudence and legal theory ever since. The aim of this paper is to briefly review the process by which the Constitutional Court has gradually shifted in recent years from the enforcement of subjective criteria to the assessment of substantive ones in the context of the examination of freedom of expression in the public sphere – especially in criminal cases, in relation to the constitutional assessment of defamation and libel – is no longer the question of who the opinion (or the press release) is about (e.g. public figures), but rather on the type of matter (i.e. public or non-public) in which it appears. Of course, the being of public figures is still a possible aspect of the assessment, but it can now be carried out primarily (and subordinately) in order to determine whether the facts under constitutional assessment are indeed public matters (and thus whether the „speech" made in this context is covered by the special protection of freedom of expression in political and social matters) or not.

***Keywords**: human dignity, freedom of expression, freedom rights, public speech, Hungarian Constitutional Court*

1. Introduction

Freedom of expression[2] and the closely related freedom of the press are two extremely important constitutional rights, which are protected by both the old Constitution, as amended by Act XXXI of 1989 (the constitutional amendment on the rule of law)[3] and the new Constitution of Hungary

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2 *Antal Ádám* and *Gábor Halmai* argue that the term *„freedom of expression"* has a broader meaning than *„freedom of opinion",* see: Antal – Halmai, Problems of freedom of opinion in constitutional law 11. At the same time, the term *„freedom of expression"* is somewhat alien to Hungarian terminology, and the term *„freedom of speech"* or *„freedom of opinion"* is more appropriate. Nevertheless, jurisprudence uses these terms essentially as synonyms and as if they mean the same thing. Cf. Koltay, Freedom of expression, freedom of the press and the disclosure of data of public interest 2223.

3 Act XX of 1949; hereinafter referred to as the Constitution.

(the Fundamental Law of Hungary)[4] being in force since 1 January 2012. This special protection not only appears in the constitutional normative texts [Article 61 (1) - (2) of the Constitution; Article IX (1) - (2) of the Fundamental Law], but also in the practice of the Constitutional Court as a "particularly precious" right,[5] which may be restricted only in particularly justified cases and under strict conditions.

The aim of this paper is to briefly review the process by which the Constitutional Court has gradually shifted in recent years from the enforcement of subjective criteria to the assessment of substantive ones in the context of the examination of freedom of expression in the public sphere; as a consequence, the main criterion for the restriction of freedom of expression in the public sphere – especially in criminal cases, in relation to the constitutional assessment of defamation and libel – is no longer the question of who the opinion (or the press release) is about (e.g. public figures), but rather on the type of matter (i.e. public or non-public) in which it appears. Of course, the being of public figures is still a possible aspect of the assessment, but it can now be carried out primarily (and subordinately) in order to determine whether the facts under constitutional assessment are indeed public matters (and thus whether the "speech" made in this context is covered by the special protection of freedom of expression in political and social matters) or not.

To this end, we will first review the Hungarian Constitutional Court's (Hcc) previous case law on freedom of expression and its prominent (still applied and cited) findings, both in general terms (outlining the constitutional aspects of freedom of expression in general terms) and in relation to public actors, public affairs and those exercising public authority. In this context, particular attention will be paid to criminal law issues where there is a conflict between the protection of human dignity and the right to freedom of expression, with taking into account the general constitutional aspects that provide general guidelines for cases of conflict between the two rights. We believe that this grounding is indispensable for the presentation of the Constitutional Court's practice in the relationship between human dignity and freedom of expression, since it provides a general grounding therefor and also for the justification for the protection of freedom of expression in particular. Next, as a *par excellence* exposition of our topic, we will describe the turn of events in which the Constitutional Court has clearly shifted the focus of the legal (and judicial) restriction of public speech to the substantive aspects (the public nature of the case under examination or the lack thereof), and which, by means of this turn of events, nowadays recognises the examination of the subjective aspect (the attribution to be a public figure and the specific ways of public participation) purely as part of this.

4 Hereinafter referred to as the Fundamental Law.

5 See for the first time: Decision 7/2014. (III. 7.) AB, Reasoning [39].

2. The Constitutional Court's practice on freedom of expression under the Constitution

2.1. Credo of the Constitutional Court

According to the first, characteristic decision of the Constitutional Court on freedom of expression, i.e. the Decision 30/1992. (V. 26.) AB, freedom of expression has a prominent role among the fundamental constitutional rights, in fact it is the "mother right" of several other freedoms, the so-called fundamental rights of communication. The fundamental rights of communication include freedom of speech and of the press; freedom of artistic and literary creation and freedom to disseminate artistic creation; freedom of scientific creation and freedom to teach scientific knowledge; the right of assembly; and the right to freedom of conscience and religion. According to the Constitutional Court's credo here, freedom of expression *"enables the individual to participate in social and political processes in an informed manner. Historical experience has shown that whenever freedom of expression has been restricted, social justice, human creativity and the possibility of developing one's potential have been impaired. The damaging consequences have been felt not only in the life of the individual but also in the life of society, and have led to a dead end in the development of humanity, with much suffering. The free expression of ideas and views, the free expression of even unpopular or idiosyncratic ideas, is a prerequisite for the existence of a developing and truly living society."*[6] Furthermore, *"The right to freedom of expression protects opinions regardless of their value or truth. This alone (...) corresponds to ideological neutrality (...). There are only external limits to freedom of expression; as long as such a constitutionally imposed external limit is not encountered, the possibility and fact of expressing an opinion is protected, regardless of its content. (...) The Constitution guarantees free communication - individual conduct and social process - and not the content of the basic right of free expression. In this process there is room for all opinions, good and bad, pleasant and offensive, especially since the very qualification of opinion is a product of this process."*[7]

2.2. Hate speech and hate crime

However, freedom of expression is - of course - not unlimited: it may be restricted in order to protect the dignity of others, other fundamental rights or certain constitutional objectives, such as public order or public security. In this respect, Decision 30/1992. AB (also) made important statements of principle and practice in relation to so-called hate speech.[8] In the Criminal Code in force at the time[9] , the offence of incitement to hatred (against specific groups) and the offence of using insulting or degrading language (group defamation) were two elements.[10] The Hcc ruled

6 Decision 30/1992. (V. 26.) AB, ABH 1992, 167, 171.

7 Decision 30/1992. (V. 26.) AB, ABH 1992, 167, 179 (emphasis from the Author).

8 *László Sólyom* calls the determination of the constitutional extent of criminal law interventions the key issue of this right. Sólyom, Az alkotmánybíráskodás kezdetei Magyarországon 474.

9 Act IV of 1978 on the Criminal Code of Hungary (hereinafter: old Criminal Code).

10 Old Criminal Code, Article 269 *"(1) Any person who, in public, incites hatred against a) the Hungarian nation or a nationality, b) a people, a religion or a race, or a group of the population, commits a crime and shall be punished by imprisonment for up to three years. (2) Any person who, in a public place, uses an insulting or degrading expression against the Hungarian nation, a nationality, a people, a religion or a race, or commits any other such act, shall be punished for the misdemeanour by imprisonment for a term of up to one year, or by corrective labour or a fine."*

that while the former was constitutionally punishable, the latter was not. Incitement to hatred is nothing other than the emotional preparation of violence, an abuse of freedom of expression. An inciting person makes other people perform hostile behaviour or harmful action against a person, group, etc.[11] Behind this disturbance of public peace lies the danger of violating a large number of individual rights: the anger aroused against a group threatens the honour, dignity and even the lives of the members of the group, and also restricts their exercise of other rights by intimidating them.[12] According to the Hcc, hate speech and incitement to hatred constitute a threat which makes it necessary and proportionate to restrict freedom of expression. In the case of "group defamation", on the other hand, the fact that the offensive expression or equivalent act is capable of disturbing public peace is not an element of the offence. The offence is committed even if the offensive language does not, in the circumstances, entail any risk of harm to individual rights. Such an abstract threat to public order is therefore not, according to the Hcc, a sufficient ground for restricting freedom of expression by criminal penalties.[13] However, according to the Hcc, *"the dignity of communities may be a constitutional limit to freedom of expression. The decision therefore does not preclude the legislature from providing for this even by means of criminal law protection going beyond the offence of incitement to hatred."*[14]

Four years later, Act XVII of 1996 amended the definition of incitement to hatred, and in addition thereto, it also criminalised *"other acts capable of inciting hatred"*, which the Hcc, in its Decision 12/1999. (V. 21.) AB, also declared unconstitutional. It did partly because only a concrete threat of violence can justify a restriction of freedom of expression, and partly because the expression of *"other acts capable of inciting hatred"* is too broad and thus undefined, which violates legal certainty.[15] In 2004, on the basis of a preliminary review motion of the President of the Republic[16] the Hcc ruled that the Criminal Code – the text of *"other acts capable of inciting hatred"* - was unconstitutional which would have criminalised *"incitement to hatred"* against specific groups,[17] as well as *"incitement to commit acts of violence"* against them, and *"defamation"* and *"humiliation"* on the grounds of their membership of a group. The Hcc expressed the view that these acts, far from undermining constitutional democracy, actually strengthen it.[18]

11 Cf.: Decision 30/1992. (V. 26.), AB, ABH 1992, 167, 177.

12 Cf.: Decision 30/1992. (V. 26.), AB, ABH 1992, 167, 178–179.

13 Of course, not everyone agreed with the reasoning of this decision and the subsequent Constitutional Court decisions on similar issues [Decision 12/1999. (V. 21.) AB, Decision 18/2004. (V. 25.) AB, Decision 95/2008. (VII. 3) AB]. For a nearly complete list of the relevant dissenters, see: Tóth, A szólástilalom közvetlen veszélye 83–89.

14 Decision 30/1992. (V. 26.) AB, ABH 1992, 167, 181.

15 In the reasoning of this decision, the Hcc reiterated the opinion expressed in Decision 30/1992. that *"the dignity of communities may be a constitutional limit to freedom of expression."* Decision 12/1999 (V. 21.) AB, ABH 1999, 106, 109.

16 Cf.: The criminalisation of hate speech. Petition of the President of the Republic to the Constitutional Court 131–136.; and Comments of the Minister of Justice on the motion 137–140.

17 The Constitutional Court did not consider the term *"incitement"* as a synonym for *„instigation"*, but as a lesser offence, which (unlike instigation) cannot enjoy constitutional protection under criminal law against freedom of expression. Török, Media law yardsticks for the prohibition of hate speech 59–72.

18 According to the Hcc, *"political debate in which differing views, positions and ideas are in conflict with one another is a characteristic of democracy (...) A tolerant society, which ensures genuine freedom of expression, has a positive impact on the individual, strengthens the character of its citizens, and develops intellectually independent individuals who are capable of managing their lives autonomously, committed*

According to the Constitutional Court, the use and spreading of abusive expressions capable of degrading honour or human dignity, as well as the making of abusive gestures reminiscent of or referring to an authoritarian regime or idea, would also have restricted legal certainty in an unconstitutional manner.[19] Therefore, on the basis of the President of the Republic's motion for preliminary review, the Constitutional Court rejected this amendment to the Criminal Code in its Decision 95/2008. (VII. 3.) AB, also declaring it unconstitutional and prescribing that it could not enter into force.[2021]

II.3. The inclusion of the „dignity of communities" as a criterion in the HCC's assessment

The softening of the previous *credo* occurred from the turn of the millennium, when the Hcc explicitly considered it permissible to restrict freedom of expression in order to protect certain community objectives and values. In its Decision 13/2000. (V. 12.) AB, the Hcc found the crime of *"violation of national symbols"*[22] constitutional,[23] and ruled that national symbols (the Hungarian national anthem, flag and coat of arms) *"are constitutional symbols of the external and internal integrity of the country, and therefore there are constitutional arguments for their protection under criminal law. Increased public and criminal law protection of the institutions expressing and representing national sovereignty is constitutionally accepted in European legal cultures, and is also a justified limitation of freedom of expression."*[24] (However, in the United States and other countries, for example, flag burning and desecration of other national symbols is a permissible means of expression.)[25]

In its Decision 14/2000. the Hcc recognised the offence of *"use of authoritarian symbols"*[26] that freedom of expression may also be restricted in the interests of the dignity of communities,

to the ideas and values they hold, but open to the arguments of those who disagree and think differently." Decision 18/2004. (V. 25.) AB, ABH 2004, 303, 305.

19 (Old) Criminal Code, 181/A. § para (1).

20 *"Constitutional democracy (...) does not suppress extremist voices merely because of their content. In a democratic society, such generalised racist speech cannot change the fact that, from the point of view of the state, all citizens are equally valuable and equally entitled to fundamental rights."* Decision 95/2008. (VII. 3.) AB, ABH 2008, 782, 789.

21 For a brief inventory and liberal, explicitly pro-free speech assessment of the Constitutional Court decisions on *"hate speech"* handed down between 1992 and 2008, see: Hanák, Sacred Freedom of Speech 56–63.

22 (Old) Criminal Code 269/A §.

23 For a thorough and incisive critique of this decision, see: Halmai, Fundamental rights protection in reverse? 69–83.

24 Decision 13/2000. (V. 12.) AB, ABH 2000, 61, 69. *"Democracies are characterised by the existence of institutions and symbols representing the unity of the country, which, although being also, in some way, open to criticism, are in certain respects outside the pluralism of opinions which must be protected by constitutional law."* Decision 13/2000. (V. 12.) AB, ABH 2000, 61, 69. *" In the absence of any other legal instrument to be taken into account, the application of a criminal law rule (with the prospect of a mild sanction in relation to the criminal law system) cannot be considered disproportionate in the case of an infringement of national symbols (...)."* Decision 13/2000. (V. 12.) AB, ABH 2000, 61, 70.

25 On American flag burning as a permissible means of freedom of expression, its development and constitutional understanding, see e.g. Dry, Flag Burning and the Constitution 69–103; Darling, Flag Burning: Johnson, Eichman and Beyond 101–119.

26 Old Penal Code 269/B. §

and that the prohibition of the distribution, public display or use of certain authoritarian symbols (swastika, SS badge, Arrow Cross, sickle/hammer sign, five-pointed red star) may therefore be considered constitutional.[27][28] This was later confirmed by the Decision 4/2013., which annulled the Criminal Code provision on the use of authoritarian symbols with *pro futuro* effect, giving the legislator the opportunity and time to draft and enact a constitutionally acceptable provision. The reason of this annulment was that the legislator had defined the relevant facts so broadly that would make it possible at the law enforcement process *"an almost entirely discretion"*,[29] and this would lead to a risk of an unconstitutional restriction of expression due to probable multiple interpretations.[30] The threat of a criminal penalty for the use of symbols of authoritarianism, however, may be justified because, on the one hand, conduct associated with the symbols of the extreme political dictatorships of the 20th century may be sensitive or offensive to human dignity and, on the other, the punishable acts penalised by this crime are contrary to the constitutional values derivable from the Fundamental Law".[31,32]

This decision was necessary mainly because the European Court of Human Rights (hereinafter: Ecthr) in *Vajnai v. Hungary*[33] and later in *Fratanolo v. Hungary*[34] ruled that the red star, which is a communist symbol, has multiple meanings (it is not only a communist symbol but also a symbol of the labour movement), so its use does not necessarily imply identification with authoritarian regimes (just as in the case of *Attila Vajnai*), and that a general prohibition of this kind would therefore restrict the freedom of expression guaranteed by the European Convention on Human Rights (hereinafter: Echr or the Convention). The same was also true for the *Árpád*'s striped flag, which, according to the decision in the case of *Fáber v. Hungary,*[35] can also be interpreted not only as an

27 According to the Hcc, *"[t]he limit of the constitutionally permissible restriction (...) is reached when the prohibited conduct does not merely express a political view - whether right or wrong - but more than that: it threatens public tranquillity by violating the dignity of communities committed to the values of democracy (...) Public tranquillity may in such a case be protected by criminal law."* Decision 14/2000. (V. 12.) AB, ABH 2000, 83, 92.

28 It is worth quoting here the insight of *Bernát Török*: *"[the* HCC*] annulled the previous provision with pro futuro effect, but its reasoning did not contribute to clarifying the doctrine of freedom of expression, since its decision was based on the constitutional requirements of criminal law under the rule of law, not on the freedom of expression."* Török, On offensive words 265.

29 Decision 4/2013 (II. 21.) AB, Reasoning [70].

30 For a presentation of this earlier relevant criminal court practice, see Tóth, The use of authoritarian symbols as a restriction on freedom of expression 178–196.

31 4/2013. (II. 21.) AB, Reasoning [58].

32 *Péter Smuk* provides an analysis of the semiotic and social connotations of use of authoritarian symbols in the context of Hungarian judicial practice and the relevant decisions of the Constitutional Court. See: Smuk, symbols of authoritarian regimes and the system of legal sanctions prohibiting their use 230–252.

33 *Vajnai v. Hungary*, judgment of 8 July 2008, no. 33629/06. For a summary of the *Vajnai* case, see Vajnai, Attila v. Hungary 102–104. For a brief summary, see, e.g.: Koltay, The Vajnai case 803–807.; for the full judgment see http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{%22fulltext%22:[%-22vajnai%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-87404%22]} (03/04/2025).

34 *Fratanoló v. Hungary*, judgement of 3 November 2011, no. 29459/10. For a brief summary of the case, see Fratanoló, János v. Hungary 89–90.; for the full judgment see http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{%22fulltext%22:[%22fratanolo%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-107307%22]} (03/04/2025).

35 *Fáber v. Hungary*, judgement of 24 July 2012, no. 40721/08. For a brief summary of the judgement,

authoritarian (Arrow Cross) symbol, but also as a historical one. For this reason, in such cases, one could expect that the ECtHR would continue to condemn Hungary for violating the Convention. The official reasoning of the Hcc was also, partly, based on this problem.

The Hcc also ruled the offence of *"public denial of the crimes of the national socialist and communist regimes*" [(old) Criminal Code 269/C. §][36] It *"considers the dignity of the relatives of the victims, of the members of communities who remember the victims and of communities committed to the values of democracy in general to be a constitutional value to be protected by the Fundamental Law. However, the Constitutional Court considers that the expression of opinions prohibited by the Criminal Code is capable of arousing passions which may ultimately jeopardise the preservation of public tranquillity. The Constitutional Court also recognises as a constitutional objective the preservation of an unconditional social commitment to the principles of democracy and the rule of law."*[37] According to the Hcc, the constitutionality of the offence of *scaremongering* depends on whether it is intended to protect public tranquillity alone (because this objective alone is not sufficient to restrict freedom of expression)[38] or whether it (also) protects some more important constitutional value.[39]

2.4. Early Constitutional Court practice on the higher tolerance of public officials and politicians and the justification of freedom of expression

The standards for the restriction of freedom of expression (and, therefore, of fundamental rights in general) were formulated by the Hcc in its own pro-freedom of expression credo in Decision 30/1992, AB.[40] According to the so-called necessity-proportionality test established in this case: *"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*

see Fáber v. Hungary 130–132; for the full judgment see: http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{%22fulltext%22:[%22f%C3%A1ber%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-112446%22]} (03/04/2025).

36 Today, it is more appropriately called *"open denial of nazi crimes and communist crimes"* Act C of 2012 (new Criminal Code), 333. §).

37 Decision 16/2013. (VI. 20.) AB, Reasoning [55].

38 The mere criminal law provision that *"anyone who, in public, states or reports an untrue fact or distorts a true fact in such a way which is capable of disturbing public peace"* [old Criminal Code, 270. § para (1), in force until 5 June 2000] is unconstitutional. On a similar basis, the Hcc annulled the 270. § para (2) of the old Criminal Code on the same grounds. In its Decision 20/2006. 366. § para (1) of the old Criminal Code, so that the military offence of *"destroying the fighting spirit"* remained in force after 31 May 2006 with the wording *"whoever, in time of war, incites discontent among soldiers, creates disaffection"*. Cf. Decision 20/2006. (V. 31.) AB, ABH 2006, 315.

39 Thus, for example, the Decision 18/2000. itself stated that in certain cases the spreading of rumours is constitutionally punishable: *"There is no constitutional obstacle to the legislator punishing the deliberate statement of false facts (rumours, distortion of facts) in public, if it is committed in an exceptional situation, e.g. in a public danger or in time of war, and may lead to the disturbance of public peace."* Decision 18/2000. (VI. 6.) AB, ABH 2000, 117, 130. This is the basis on which this offence is still regulated in the Hungarian legal system. Cf. Criminal Code, 337. §.

40 For a general, but brief overview of the limits of this right, see: Sári – Somody, Fundamental Rights 162–171.

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 like doing so by using a restriction of disproportionate weight compared to the purported objective."[41] [Until the entry into force of the Fundamental Law, this test was only a binding (*erga omnes*) interpretation of the Constitutional Court, without any positive-law formulation.][42]

The most important decision of the Constitutional Court so far and for a long time, Decision 36/1994 (VI. 24.) AB, was made on the basis of these theorems and the necessity-proportionality test. This decision was issued on the unconstitutionality of Article 232 of the old Criminal Code, i.e. the offence of *"insulting an authority or official"*, but it also contains (in the operative part) a constitutional requirement and (in the reasoning) a number of principles as regards the offences of defamation and libel and the obligation of tolerance of public figures and those exercising public authority in relation to these offences. As regards the part of the decision with direct substantive legal consequences, the Hcc annulled the Article 232 of the old Penal Code, as it held that the offence of insulting a public authority or official was unconstitutional in its entirety, namely because it infringed the proportionality requirement of the fundamental rights test. If freedom of expression is a privileged fundamental right which must be surrendered to very few rights and in very few cases [as stated in Decision 30/1992.], then the increased protection of public authorities and officials, which is more important than that of other victims, is not justified, i.e. it is disproportionate to the aim pursued. Although protection may be necessary, because the dignity, honour and reputation of these persons may also require protection and may justify - in extreme cases - recourse to the criminal law system, the exercise of the fundamental right to freedom of expression as a subjective right, which is an integral part of the recognition of human personality, is not. Criticism of public authorities, officials and politicians in public life, as a key democratic value which plays a role in shaping public opinion, justify a lesser restriction of freedom of expression against this group of victims, that is to say, a lower level of protection of their dignity, honour and reputation. The increased criminal-law protection of honour imposed on the right to freedom of expression is therefore in any event unconstitutional.[43]

There are two grounds for justifying the protection of freedom of expression as a core value. On the one hand, on an individual (human rights) basis, according to which opinions are an integral part of a person's moral integrity and personality, and their expression is a right deriving from the person's autonomy; on the other hand, on a collective (objective) basis, according to which the protection of freedom of expression serves community goals and interests. The Decision 7/2014. (III. 7.) AB later put it[44] that the former can be called the utilitarian justification, and the latter the deontological one.[45]

This double justification of freedom of expression runs through the practice of the Constitutional Court, culminating in the Decision 7/2014. (III. 7.) AB.[46] Furthermore, the most

41 Decision 30/1992. (V. 26.) AB, ABH 1992, 167, 171.

42 Since 1 January 2012, Article I para (3) of the Fundamental Law contains this test *expressis verbis.*

43 Cf. Decision 36/1994. (VI. 24.) AB, ABH 1994, 219, operative part.

44 Decision 7/2014. (III. 7.) AB, Reasoning [9] (emphasis mine - the author).

45 For more on the theoretical attempts to justify freedom of expression, see: Koltay, Bases of free speech 25–47; and Tóth, Defamation and libel in the jurisprudential thinking 515–580.

46 Cf., in particular: Decision 7/2014. (III. 7.) AB, Reasoning [39].

important, previously unexplained principle of this decision is that these two justifications do not undermine or replace, but complement each other: *"the two justifications and contents of freedom of expression and freedom of the press, i.e. the subjective side focusing on individual self-expression and the institutional side focusing on democratic public opinion, are not competing, even less mutually weakening arguments, but mutually complementary and supportive constitutional aspects"*,[47] which *"as a whole (...) reinforce each other."*[48] In comparison, in Decision 13/2014. (IV. 18.), which is a landmark decision for the constitutional assessment of defamatory offences and will be analysed later, no new principle on double justification is introduced.[49]

From the quotes cited, it can be seen that the Hcc actually deals with freedom of expression and its possible limitations mainly as an indispensable condition for the formation of democratic will, and lays down individual (constitutive) justification as an axiom at most, without much argumentation. The Hcc thus derives the privileged role of the fundamental right to freedom of expression primarily from a utilitarian basis.

However, the double justification of the priority protection of freedom of expression has also appeared in other aspects of the Constitutional Court's practice. With regard to defamation and libel, the most important are the Decision 36/1994 (VI. 24.) AB on the constitutionality of Articles 179 and 180 of the old Criminal Code (defamation and libel), in particular the constitutional requirements applicable to them. These constitutional requirements deal with the constitutional extent of the criticizability of public authorities, public officials and public politicians. This decision annulled the crime of *"insulting a public authority or official"*; thereafter, the same criminal law provisions applied to public authorities and officials (and of course to public politicians) as to other persons. According to the decision, while the Constitution does not preclude the criminal protection of the honour or reputation of a public authority or official,[50] the scope of expression of opinion protected by the right to freedom of expression, is wider for expression of opinion related to persons exercising public authority and public politicians than related to other persons.[51] It follows that, in the application of the criminal law offences of defamation and libel, it is a constitutional requirement that the scope of expression of opinion constitutionally protected by the right to freedom of expression in relation to the above subjects should be wider than in relation to others.[52]

In the case of this group of victims, the Hcc set the following benchmark as a constitutional requirement for the application of criminal law: *"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."*[53]

47 Decision 7/2014. (III. 7.) AB, Reasoning [41].

48 Decision 7/2014. (III. 7.) AB, Reasoning [41].

49 Cf. Decision 13/2014. (IV. 28.), Reasoning [23].

50 Cf. Decision 36/1994 (VI. 24.) AB, ABH 1994, 219, operative part, point 1.

51 Decision 36/1994 (VI. 24.) AB, ABH 1994, 219, operative part, point 1.

52 Decision 36/1994 (VI. 24.) AB, ABH 1994, 219, operative part, point 3.

53 Decision 36/1994 (VI. 24.) AB, ABH 1994, 219, operative part, point 3.

Public authorities, officials and politicians in public life (simplified: public officials and politicians) must therefore endure more than ordinary people, because the need for freedom of exchange, which is at the heart of democracy, means that the limits of criticism of them must be wider.[54] If this were not the case, that is to say, if the person making value judgments or value-laden claims against public officials and politicians were to face the possibility of criminal prosecution for the conduct that they have engaged in, it would lead to the silencing of opinions against public figures and ultimately to the chilling effect of free debate, because of the self-censorship that individuals themselves would be forced to exercise.

However, the judicial practice, although it regularly referred to the Decision 36/1994. (VI. 24.) AB, in reality neglected the constitutional requirements related to defamation, and instead developed its own case law, which partly differed from the decision of the Constitutional Court.[55] For this reason, it was necessary to lower the hitherto abstract standard to the level of concrete application of the law, by means of the so-called real constitutional complaint introduced by the new Fundamental Law coming into force on 1 January 2012.

3. The "milestone": the Decision 13/2014.[56]

According to the Fourth Amendment to the Fundamental Law of Hungary (25 March 2013), the following provisions, among others, shall be added to Article IX of the Fundamental Law on Freedom of Expression:[57] *"(4) The right to freedom of expression may not be exercised with the aim of violating the human dignity of others. (5) The right to freedom of expression may not be exercised with the aim of violating the dignity of the Hungarian nation or of any national, ethnic, racial or religious community. Persons belonging to such communities shall be entitled to enforce their claims in court against the expression of an opinion which violates their community, invoking the violation of their human dignity, as provided for by an Act."*

Human dignity has therefore become an explicit limit to freedom of expression since spring 2013. In interpreting this, the Hcc held that the Fourth Amendment to the Fundamental Law has not changed the substance of the case. As human dignity has always been a key protection, the Hcc has accepted it as a legitimate limit to freedom of expression and will continue to do so. This is also true for civil law and administrative provisions (including electoral law) and, of course, for criminal law. In the latter respect, the Hcc was soon to prove that it did indeed believe this to be the case, as a so-called genuine constitutional complaint was lodged, in which the Hcc set out the standard to be followed by the ordinary courts in distinguishing between defamation and libel, and also defined the public policy aspects.

The case underlying Decision 13/2014. (IV. 18.) AB is a statement made during a public debate in a small town, for which criminal proceedings were initiated. The subsequent petitioner, the first defendant in the criminal proceedings, *Jr. Ottó Szalai* was the municipal representative of the town of Siklós, and the victim, *Dr. János Marenics*, was the mayor of Siklós. In January 2011, an article was published in a local public newspaper by *Mr. Szalai*. In this article he

54 There are no constitutional criteria for the exact contstraints of this; the Constitutional Court itself has refrained from doing so.

55 Cf. e.g. Koltay, Bases of free speech 405–408; Karsai, Commentary on the Criminal Code 477.; Szomora, Reference typology of constitutional requirements in defamation and libel cases 469–476.

56 For more detailed information on the decision itself, see e.g. Tóth, Decision 13/2014 139–148.

57 Fourth Amendment to the Fundamental Law of Hungary (25 March 2013) Article 5 para (2).

wrote the following: *"János Marenics and his deputy mayor] do not spare taxpayers' money for themselves and treat it as if it were their own."*

This statement was considered by both the trial and appellate courts as containing a statement of fact for which proof of the truth was ordered, but since it failed, the defendant was sentenced to a fine for defamation. *Mr. Szalai* lodged a constitutional complaint under Article 27 of the Act on the Constitutional Court of Hungary (so-called genuine constitutional complaint), seeking a declaration that the decision was unconstitutional and its annulment. The Constitutional Court upheld the complaint in its Decision 13/2014. (IV. 18.) AB, declared the decision of the second instance and the decision of the first instance unconstitutional and annulled them, as they violated the freedom of expression recognised by Article IX para (1) of the Fundamental Law. The decision did not contain anything new as regards the double justification of the privileged protection of freedom of expression,[58] the conception of this fundamental constitutional right as a mother right of communication rights,[59] and the affirmation of the principle of the protection of opinions independent of their content.[60]

However, it was a novelty that the freedom of expression, which until then had been interpreted as a mere principle in abstract norm control procedures, was interpreted by the Hcc in a way that is also applicable for courts deciding in real criminal proceedings, and that has an impact on the concrete judgment. What was also new was that the focus shifted from public politicians and public figures in general to public affairs. Thus, in the assessment of the constitutionality of the criminal interpretation of various statements, the focus of the analysis should no longer be on the general status of the person expressing the opinion (whether or not he or she is a public figure), but on the fact whether or not the statement or opinion was made in connection with public affairs.[61] Finally, in this decision, the Cons-

58 13/2014 (IV. 18.) AB, Reasoning [23].

59 13/2014 (IV. 18.) AB, Reasoning [24].

60 13/2014 (IV. 18.) AB, Reasoning [24]–[25], [31].

61 However, the path of development has not been smooth, as exemplified by the Decision 1/2015. (I. 16.) AB, in which the Hcc again based its decision on the public character of the expression (or lack thereof in the specific case), rather than on the examination of its connection with public affairs. In the case at hand, the Hcc declared the judgment No. 3.Bhar.16/2013/5 of the Metropolitan Court of Appeal as a court of third instance to be unconstitutional and annulled it, as the ordinary court had acquitted with final effect the author of the statements on the internet social network that had insulted the honour of the complainant. The defendant in the criminal case had posted the name of a lawyer in one his social media (*"iwiw"*) account, under the heading *"animals"*, alongside his own dog, and called her a *„lawyer imitation"*, and in a later post, an *"ugly steal-cheat-lie dog"*. The court of first instance found the perpetrator criminally liable for defamation (putting him on probation for three years), but the court of appeal (the court of second instance) acquitted him for lack of evidence. The court of third instance upheld the latter decision, but acquitted him on different legal grounds than the court of second instance, namely the absence of a criminal offence. According to the court of third instance, it was irrelevant whether the accused had actually committed the offence, since the act itself was not punishable in the specific situation. The court reasoned that the lawyer is a public figure and therefore has a higher duty of tolerance than others when the conduct against her is related to her activities as a lawyer. Since this was the case in the present case, the court held that the expressions under consideration did not rise to the level of conduct which a lawyer, as a public figure, would not be obliged to tolerate. The Hcc found this decision to be unconstitutional because, contrary to the court's understanding, the lawyer could not be considered a *"public figure"* and the Court therefore extended freedom of expression to defamatory statements against lawyers in a manner that was unconstitutional. The reasoning of

titutional Court also set out the standard to be followed by the courts in distinguishing between factual statements and value judgments.[62]

The focus has therefore shifted from the public figures to the underlying issue. This is based on the (correct) recognition that a public figure may also be involved in private matters in which the paramount protection of freedom of expression does not justify the victim being obliged by law to tolerate defamatory statements or other acts, and conversely, a non-public figure may also be placed of his own will in a situation where he is involved in public matters. In the latter case, the freedom to discuss public affairs also justifies the special protection of freedom of expression when it is exercised against a non-public figure, since only in this way can free public debate and the fearless and uncompromising expression of opinion be guaranteed.

The declaration of this theorem was not without precedent, but the free discussion of public affairs had previously been used only as a justification for the criticizability of public actors (in the interests of democracy), not as an independent criterion for assessing the constitutionality of opinions. The latter was only the case in Decision 13/2014. (IV. 18.) AB [and referentially already in Decision 7/2014 (III. 7.) AB],[63] in which the Hcc stated, for example, that *"the expression of opinions on public affairs focuses primarily on the democratic functioning of the political community and not on the person of the public figure involved in the speech or criticism."*[64] Furthermore, *"In assessing a public communication, it is necessary to decide first of all whether the communication in question reflects the expression of a view on public affairs, a position expressed in a public debate, that is to say, whether it is connected with the free discussion of public affairs."*[65] In other words, the primary aspect of the constitutional balancing test, before any other consideration, is not whether the statement concerned a public figure, but specifically whether the statement was made in connection with a public matter.[66]

The need to examine the objective rather than the subjective aspects was later confirmed by the Hcc in a civil law case in its Decision 28/2014 (IX. 29.) AB, with the difference that this decision did not use the term *"public matter"* but *"public activity"*: *"According to the legal literature, the*

the Hcc was therefore not based on the fact that the lawyer was not involved in a public case, i.e. it did not focus on the merits of the case, but on the general status of the victim, whether or not she was a public figure.

62 However, in theory, the exact boundary between a factual statement and an expression of opinion is not (and cannot be fully) clarified. The reason for this, as *László Blutman* puts it, is that *"there is only a difference of degree between stating a fact and expressing an opinion. Factual communication is inevitably subjective, and opinion usually has a close factual connection."* Blutman, Disguised Factual Disclosures and Fact-based Value Judgments 214. *Blutman* highlights the following aspects of Hungarian practice for detecting factual statements: factuality, provability, individual recognizability or separability, and concreteness (ibid.).

63 Cf. e.g. *"[The] focus of public expression is on public affairs themselves - not on public actors."* Decision 7/2014. (III. 7.) AB, Reasoning [48].; *„The heightened protection of political expression applies to value judgments made in public affairs as well as to statements of fact in the sphere of public affairs."* Decision 7/2014. (III. 7.) AB, Reasoning [50] etc.

64 13/2014. (IV. 18.) AB, Reasoning [26].

65 13/2014. (IV. 18.) AB, Reasoning, [39].

66 The assessment criteria were therefore set out in two stages. Under Decision 13/2014. AB, courts must first decide whether the incriminated speech was made in a public matter and, if so, secondly, whether it is a statement of fact or an expression of opinion. Finally, integrating the Hcc's general approach to human dignity, Decision 3329/2017 (XII. 8.) AB explained - as a third step, in the case of value judgments - the examination of whether the speech does not restrict the inalienable core of human dignity. Cf. Decision 3329/2017. (XII. 8.) AB, Reasoning [42].

appearance at public events which generally influences the life of society, determines the development of national or local conditions, or which is created for such a purpose, can be considered as public activity (...). Typical of such activities are speaking at cultural, social, political events and meetings, or any other public participation. This qualification is not linked to any formal social or legal status. Public participation is based on the fact of activity in public sphere".[67] Similarly, according to Decision 31/2014. (X. 9.) AB, *"[f]reedom of expression is therefore increasingly asserted in relation to value judgments that are expressed in the form of conflicting opinions on public affairs, even if they may be exaggerated and exalted".*[68] With the exception of one decision,[69] public participation (involvement in public affairs) has remained at the heart of the Hcc's practice on freedom of expression and, apart from the extensions and clarifications to be analysed later, it is still the guiding principle today.

In the decision 13/2014. AB, the Hcc also outlined the criteria on which the public prosecution of the case was based.[70] On this basis, it finally concluded that the statement on which the criminal case was based, *Mr. Szalai*'s statement was in fact made in a public matter,[71] i.e. it is subject to the special (but not unlimited) protection of freedom of expression.

In addition, in this decision the Hcc also explained the criteria for the distinction between defamation and libel, and between factual statements and value judgments, at the same time confirming its 1994 thesis that public debate (now, however, not in the context of public status, but in the context of public affairs) can be constitutionally restricted only within a narrow range: not at all with regard to the expression of opinions,[72] and with regard to the disclosure of facts in the cases and to the extent set out in Decision 36/1994 (VI. 24.) AB.[73] According to the Hcc, in a criminal case, immediately after a statement has been found to be related to public affairs, the court must decide whether the statement can be considered as a statement of fact (in the criminal sense: a communication of fact) or as a mere expression of opinion (value judgement, criticism, etc.).[74]

67 Decision 28/2014. (IX. 29.) AB, Reasoning [30].

68 Decision 31/2014. (X. 9.) AB, Reasoning [30].; emphasis mine - T.J.Z.

69 Decision 1/2015. (I. 16.) AB. Recognising this self-contradiction, however, the Hcc clearly stated in its Decision 3328/2017. (XII. 8.) AB that *"[h]owever, the status of a public figure can only justify a special protection of expression in the context of the examination of the nature of the case."* 3328/2017 (XII. 8.) AB, Reasoning [42]. (The same decision also clarified the doctrinal issues of criminal defamation and libel in the field of criminal law, which are the result of constitutional requirements.).

70 *"In order to assess this, it is necessary to take into account primarily the manner and circumstances of the communication and the subject matter and context of the opinion. Thus, the type of medium, the event giving rise to the communication, the reactions to it and the role played by the communication in this process must be examined. Other aspects to be assessed include the content and style of the statement and the timeliness and purpose of the communication. If the assessment of these circumstances leads to the conclusion that the communication concerns the free debate on public matters, the communication automatically enjoys a higher level of protection of freedom of expression. Such communication is one of the main guarantees of the control and controllability of public power and those people exercising public power, which is an indispensable requirement for the democratic and open functioning of a society based on pluralistic foundations"* Decision 13/2014. (IV. 18.) AB, Reasoning [39].

71 13/2014. (IV. 18.) AB, Reasoning [48].

72 13/2014. (IV. 18.) AB, Reasoning [40].

73 13/2014. (IV. 18.) AB, Reasoning [41].

74 In the case at hand, the courts *"gave an expansive interpretation to the 'alleges facts' phrase in the statutory definition of the crime of defamation, which violates the fundamental right recognised in Article IX para (1) of the Fundamental Law and the tests and measures therefrom"*. Decision AB 13/2014. (IV. 18.), Reasoning [47].

However, the requirements to be assessed in the context of the conflict between freedom of expression and the right to human dignity have not changed: the Constitutional Court has so far[75] recognised dignity and the resulting protection of honour as a possible limit to freedom of expression, and in its Decision 13/2014. AB it did not rule otherwise. It stated that a communication which has no purpose other than mere humiliation cannot be constitutionally protected as it is an attack on the inalienable essence of human dignity, given that it has nothing to do with any public debate or public matter. Nor can a communication which attacks an individual in his family relations or private life (or which attacks them in the context of a public matter, but does so in a manner wholly unjustifiable by the public matter) enjoy constitutional protection.[76] Previously, a similar conclusion was reached – in general – by the Decision 7/2014. (III. 7.) AB,[77] and immediately after the decision in the Siklós case, in a specific dispute (in an election case) by the Decision 3122/2014. (IV. 24.) AB. The latter decision stated that even the dignity of a public politician has an essential, untouchable core that even those who criticise him or her must respect.[78] For instance, identification with animals dehumanises the persons concerned, so that even a politician is not obliged to tolerate this (in this case, portraying two prime ministers as monkeys). Furthermore, the dilemma between freedom of expression (and of the press) and human dignity (and, as part of that, the right to self-likeness) was similarly resolved by the Hcc in the case when a press release portrayed the faces of police officers present at public events in their capacity as public authorities in a recognizable way.[79]

4. The dismantling of the category of public activity: The HCC's currents practice[80]

The Constitutional Court's practice in relation to public affairs and public figures has subsequently been confirmed and chiselled. An important step in this process was Decision 3145/2018. (V. 7.) AB. The most important finding of this decision for our topic is the strengthening of the objective aspects of opinions and the confirmation of the constitutional significance of objective elements: *"the focus of the expression of opinions and the protection relating to it in the course of discussing public affairs is primarily not the status of the persons involved in the speech, but the fact that the speaker has expressed his views on a social or political issue."*[81] An important (bot not sole) aspect of this, is whether the person concerned, i.e. the person about whom something was said,

75 *"[Human dignity] may be a limit to freedom of expression"* Decision 30/1992 (V. 26.) AB, ABH 1992, 167, 174.

76 Decision 13/2014. (IV. 18.) AB, Reasoning [40].

77 Decision 7/2014. (II. 7.) AB, Reasoning [43], [55], [60].

78 Decision 3122/2014. (IV. 24.) AB, Reasoning [17].

79 Police intervention in demonstrations is always a current event, even if the police are not really *"participants"* in the event. Therefore, the footage of the event may be broadcast to the public without the consent of the persons in the picture, unless this constitutes an infringement of the human dignity of the police officer, as a protection of the intrinsic essence of human being, such as the suffering of a police officer injured in the exercise of their profession Decision 28/2014. AB (For a detailed presentation of the decision and its consequences, see e.g. Tóth, Likeness of Police Officers 110–128; Somody, The police officer's right to likeness as a test of fundamental rights 103–112; Orbán, The likeness of the police officers and its framework 41–58.

80 For an analysis of this practice, for a comprehensive overview, see, for example: Blutman, The Constitutional Court and freedom of expression: a misuse of facts 1–10.

81 Decision No 3145/2018. (V. 7.) AB, Reasoning [51].

is a public figure or not. Similarly, it is relevant only in the context of a public affair whether the speaker is a public figure. The fact that the debate is conducted by public figures may be a good argument for a stronger level of protection for freedom of expression, but the decisive criterion is whether the issue is a matter of public concern or interest.

The Constitutional Court further held that *"the decisive criterion for determining the status of a public figure is not the general status of the person concerned, but whether the participants in a public debate have voluntarily decided to become a shaper of public affairs, public life, or a regular or periodic participant in it"*.[82] Typical examples of such persons are, when they speak on public affairs, the so-called prominent public figures, i.e. persons exercising public authority on the one hand, and politicians acting in the public interest on the other (whether or not these latter exercise public authority); and also the so-called *"media figures"*. The latter category covers widely known media personalities who *"have a significant opinion-forming influence in various public debates"*.[83]

Finally, the third group of public figures, with a lower level of tolerance than the prominent public figures and media figures (but still a higher level than ordinary people), are the exceptional public figures.[84] They are active in shaping a public debate and are more open to criticism in this context; however, the criticizability of their speech only extends to their involvement in this role and not to their other qualities. An exceptional public figure can be anyone, regardless of their profession or vocation, who speaks at a demonstration, makes a press statement, gives a television interview or otherwise voluntarily participates in public debate.

It is very important to note, however, that in the Hcc's interpretation, *"[t]he subject matter of the speech (public issue) ... is not the sole criterion for determining the personal character of the persons concerned by the public communication. It is also essential to consider whether the person concerned has voluntarily chosen to become a shaper of public life. Indeed, freedom of expression can be justified only in cases where the participants have become more active in shaping public affairs by their own choice than others, thereby also accepting public assessment and criticism from the community concerned. They should therefore be more tolerant of opinions that are critical or offensive, or that attack them personally, in the context of public debate."*[85]

5. Conclusion

Overall, it can be concluded that the Constitutional Court maintains that the protection of freedom of expression is a priority, primarily in relation to public affairs. While until 2014 the focus of the constitutional examination was on the nature of the person, the status being a public figure, in recent years this aspect has gradually shifted towards the examination of public affairs. The nature to be a public figure is still not irrelevant, but only subordinate to the nature of public affairs; in essence, the fact to be a public figure is (among many other things) only one (albeit very important) factor in the assessment of whether or not the expression of opinion is in the public domain. It can be said, therefore, that the Constitutional Court, when examining Article IX of the Fundamental Law, including in the context of the judicial assessment of conduct that requires criminal law evaluation, no longer attaches importance to the subjective aspects, but to the existence of objective conditions: the public nature of the matter.

82 Decision No 3145/2018. (V. 7.) AB, Reasoning [50].

83 Decision No 3145/2018 (7 May 2018) AB, Reasoning [46].

84 Decision No 3145/2018. (V. 7.) AB, Reasoning [45]

85 Decision No 3145/2018. (V. 7.) AB, Reasoning [48]

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