Decision 96/2008.(VII. 3.) AB

IN THE NAME OF THE REPUBLIC OF HUNGARY

On the basis of a petition submitted by the President of the Republic seeking the prior constitutional review of an Act of Parliament adopted but not yet promulgated, the Constitutional Court – with concurring reasoning by *dr. László Kiss, Dr. Péter Kovács and dr. László Trócsányi*, Judges of the Constitutional Court – has adopted the following

decision:

The Constitutional Court holds the following: The Act adopted by the Parliament on the 29th day of October, 2007 on the amendment of the Act IV of 1959 on the Civil Code is unconstitutional.

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

Reasoning

I

At its session of 29 October 2007, the Parliament adopted an Act (Bill No. T/3719, hereinafter: "CCAm") on the amendment of Act IV of 1959 on the Civil Code (hereinafter: the CC). As the President of the Republic has marked constitutional concerns with regard to the Act of Parliament to be promulgated, he forwarded it to the Constitutional Court for prior constitutional review.

According to the reasoning of the motion by the President of the Republic, the adopted Act of Parliament imposes a disproportionate restriction on the fundamental right to the freedom of expression. Only persons can have inherent rights. While the natural persons can have inherent rights dedicated to the person and right to human dignity in the constitutional sense, legal persons can only enjoy the personality rights that are not linked exclusively to natural persons due to their special nature. In the case of a group of persons where the group has no legal entity under civil law, only the human dignity of the individuals constituting the group of persons can be the subject of violation. The insult – which is the essence of the violation of rights – addressed to the community is "radiated over" to the person in the community, offering a chance for the individual to act against it. Therefore, according to the amending Act of Parliament, a person (either a natural one or a civil organisation empowered to sue) who starts litigation because of the injury of rights would ask for judicial remedy on the basis of the violation of the rights of the individual and not of the community.

As referred to in the President's petition, protecting the honour of communities can be implemented by way of either public interest protection or personal protection. In both cases, the protection of rights results in the restriction of the freedom of expression, evaluated similarly in constitutional terms.

CCAm sets up an incontestable presumption stating that the insult aimed at the community results in the violation of the subjective rights of the community members. Thus the legislator aims to provide public interest protection by applying the lower protection threshold and tools typical to the protection of personal rights.

After establishing the above, the President's motion identifies the injury of fundamental rights as follows: due to the incontestable presumption specified in CCAm, any public conduct of gravely insulting nature radiating over to an individual who is a member of community – listed by way of open taxation in CCAm – showing an essential personal character which is in minority in the society, would

be able to restrict the freedom of expression. Consequently, the amending Act does not take into account the intensity of the relation between the group and its members, or the size and the delimitability of the community interpreted as a group. Thus in the context of the expression of opinion, the legislator establishes the transformation from the insult aimed at the community to the violation of subjective rights also in the cases when the intensity of the relation between the community and the individual is questionable or when the size or the delimitability of the community within the society is not clear. This results in a disproportionate restriction of the freedom of expression.

According to the President's motion, the minority position of a community in the society does not justify having a privileged status as specified in CCAm. This position is not characteristic of the relation between the community and the individual and it does not verify clearly the existence of the character determining the personality or the intensity necessary for "radiating" over. According to the motion, the provisions of the amending Act link the possibility of the individual enforcement of rights to the fact of the insulted community being a minority in terms of numbers. Consequently, when the personality attributes justifying the protection of rights characterise the majority of the society, the mere fact of being in majority in terms of numbers would exclude the possibility of taking action. This would lead to the violation of Article 70/A of the Constitution.

In the opinion of the President of the Republic, there is another disproportionality resulting from the fact that both any member of the community and organisations for the protection of rights could ask for action with regard to the same injury of rights, without preventing parallel actions. In the case of parallel litigations, the defendant would be forced to provide defence, resulting in disproportionality with regard to the obligation of responsibility for the expressed opinion, in particular with regard to multiple obligations of paying compensation for damages.

Finally, the President of the Republic expressed constitutional concerns about the possibility of starting actions in the public interest, i.e. allowing the organisations protecting human and civil rights to start litigation on the basis of an insult of "public dignity" presented as an inherent right. As interpreted in the President's motion, this violates the right of self-determination being a part of the right to human dignity. As in the case concerned, taking action by the organisations for the protection of rights is only allowed by the legislation for the protection of the community, such an indirect and general form of protecting the rights should only provide a more limited possibility of restricting the freedom of expression. However, the amending Act regulated the enforcement possibilities of such organisations in the same scope as that of the individuals whose rights have been injured. This method of regulating the question also results in a disproportionate restriction of the freedom of expression.

II

The provisions of the Constitution relevant in respect of the petition are as follows:

"Article 8 (2) In the Republic of Hungary regulations pertaining to fundamental rights and duties are determined by Act of Parliament; such law, however, shall not restrict the essential contents of fundamental rights."

"Article 54 para. (1) In the Republic of Hungary everyone has the inherent right to life and to human dignity. No one shall be arbitrarily deprived of these rights."

"Article 61 (1) In the Republic of Hungary, everyone has the right to freely express his opinion, and furthermore, to have access to, and distribute information of public interest."

"Article 70/A para. (1) The Republic of Hungary shall respect the human rights and civil rights of all persons in the country without discrimination on the basis of race, colour, gender, language, religion, political or other opinion, national or social origins, financial situation, birth or on any other grounds whatsoever."

The relevant provisions of the CCAm are as follows:

"Section 1 The following Section 76/A shall be added to Act IV of 1959 on the Civil Code:

Section 76/A (1) The violation of inherent rights shall be established in particular in the case of a public and gravely insulting conduct targeting racial identity, the belonging to a national or ethnic minority, the religious or other conviction, the sexual orientation, sexual identity or another essential attribute of the personality, and referring to the scope of persons having such characteristics in minority within the society.

(2) The injuring party may not refer to his or her contested conduct not being aimed directly and identifiably against the party or parties who enforce a claim on the basis of an injury under paragraph (1).

(3) The claims under Section 84 para. (1) can also be enforced by any social organisation or foundation of public interest or of paramount public interest established for the protection of human and civil rights. The mentioned organisations can only enforce the claim under Section 84 para. (1) item e) in the interest of the insulted community and for the benefit of one of the foundations of public interest or of paramount public interest established for such purpose.

(4) The claims specified in paragraph (1)-(3) can only be enforced by entering an action within 90 days of the violation of rights. The deadline is a forfeit one."

III

First of all, the Constitutional Court overviewed its standing practice regarding the restriction of the freedom of expression.

1. According to the reasoning of CCAm, the Act is aimed at providing protection for the individuals who belong to certain communities within the society, for the purpose of offering a possibility to act against conducts that offend the given community. Such conducts are similar to the ideology of totalitarian regimes, as they target a given community and the members thereof, and they aim to show to the society a negative image of the concerned community and its members by defaming the attribute fundamentally determining the identity of the community and the members of the community. This is a tendentious and continuous process, aimed at questioning their right to be considered and treated as persons of equal dignity. The process resulting from these tendentious conducts may – in extreme circumstances – result in the full defencelessness of the given community. Providing protection against such conducts is a common cause of the society. Such conducts are incompatible with the values of democratic states under the rule of law.

The regulations found in CCAm require the assessment of the interrelation of two rights: the freedom of expression and the inherent rights, as both are considered basic values in the democratic societies.

The freedom of opinion and expression regulated in Article 61 para. (1) of the Constitution, as a "mother right" related to communication, enjoys a special place in the hierarchy of fundamental rights. The freedom of expression is one of the guarantees of freely expanding one's personality and at the same time it is the fundament of the democratic operation of the society. All opinions reflect the thoughts of individual subjects and it can only be evaluated after its manifestation whether the opinion is accepted as a part of the general public opinion or it becomes rejected due to its harmful effects.

"Where one may encounter many different opinions, public opinion becomes tolerant" – stated the Constitutional Court in 1992, and we have no reason to give up this optimistic approach although the development of a democratic political culture appears to be slower than expected [Decision 30/1992. (V. 26.) ABH 1992, 167, 180, hereinafter: CCDec1]. The tolerance of the society reacts to the possibility of practising any right. In a free and well-operating society, expressing an extreme and excluding opinion does not endanger the foundations and the operability of the society, indeed, it would result in rejection, thus the persons who express excluding and extreme opinions push themselves to the periphery.

According to the reasoning of CCAm, the aim of the Act is to establish the legal protection of the "dignity of the community" in the realm of civil law. As the legal regulation resulting from the intention of the legislation has fundamental implications regarding the freedom of expression, the constitutionality of such regulation is to be evaluated in the framework of the criteria of necessity-proportionality, developed in the practice of the Constitutional Court. In line with the test consistently applied by the Constitutional Court in the cases of restricting fundamental rights, "the State may only use the tool of restricting a fundamental right if this is the sole 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 like doing so by using a restriction of disproportionate weight compared to the purported objective." [CCDec1, ABH 1992, 167, 171] Therefore the restriction of a fundamental right only complies with the requirements of constitutionality if it is necessary, proportionate and it is the most moderate means suitable for reaching the legitimate purpose.

2. Based on its objective, CCAm is to restrict the freedom of expression. This is why it is necessary to underline the principles that follow clearly and consistently from the practice of the Constitutional Court when examining the freedom of expression.

It is the consequent opinion of the Constitutional Court that the freedom of expression is a mother right of the fundamental communication rights; it is on the one hand a guarantee for the democratic operation of the society and on the other hand it is a basic tool for expressing one's individuality and fully realising one's personality. [Decision 18/2004.(V. 25.) ABH 2004, 3003, 3005, hereinafter: CCDec2] Thus the freedom of expression enjoys a privileged position among the fundamental rights, significantly narrowing down the possibilities of statutory restrictions. The right to the freedom of expression "must give way to very few rights only; that is, the laws restricting this freedom must be strictly construed". [CCDec1, ABH 1992, 167, 178]

In addition, according to the general standard developed in the standing practice of the Constitutional Court, opinions may not be restricted on the basis of their content. The Constitution protects opinions without regard to the value or truth of their contents as the link between the opinion and the subjectivity of the expressing person is stronger than the link between the opinion and its truthfulness. In the case of the freedom of expression, the fact itself of expressing the opinion is protected [CCDec1, ABH 1992, 167, 179.], and it can only be restricted on the basis of paying respect to an external – fundamental or subjective – right or to another constitutional objective.

According to another general principle, the standard of the restrictability of the freedom of expression is the concreteness of the violated fundamental right (or constitutional objective): the more concrete the protected legal subject is, the more liberty the legislation enjoys in the respect of restricting the fundamental right. In other words: the farther and the more abstract is the connection between the expression of the opinion and the resulting insult (i.e. the violated or affected subjective right or constitutional aim), the less possibilities are there to restrict the freedom of expression. As formulated in CCDec1, "the laws restricting the freedom of expression are to be assigned a greater weight if they directly serve the realisation or protection of another subjective 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 (public peace, for instance)". [ABH 1992, 167, 178.]

The Constitutional Court has also examined the how can the above principles be applied in the various branches of law in determining when and in what situations are the restrictions of the freedom of expression considered constitutional.

2.1. In the decisions related to criminal law, the Constitutional Court considered public order, more specifically public peace, as an important and constitutionally valuable objective that may justify the restriction of the mother right of communication. In the examination of the statutory definition (and several amendments of it) of incitement against the community, regulated in Section 269 of Act IV of 1978 on the Criminal Code (hereinafter: the CC) – amended several times –, the Constitutional Court made it clear that public order and public peace may justify the restriction of the freedom of expression if the principles of proportionality and of the constitutionality of criminal law are complied with. [CCDec1, ABH 1992, 167; Decision 12/1999. (V. 21.) AB, ABH 1999, 106, 110-111; CCDec2. ABH 2004. 303, 309] According to the above decisions of the Constitutional Court, however, without the concrete violation of subjective rights or the direct threat of such violation, public order and public peace – as values to be protected – are abstract concepts the protection of which under criminal law may lead to the disproportionate restriction of the freedom of opinion and expression.

In the Decision 36/1994. (VI. 24.) AB, the Constitutional Court concluded that honour – protected with the tools of criminal law – „may constitute the outer limit of the freedom of expression realised in value judgements" and at the same time the Constitutional Court set wider limits for the possibility of expressing opinion about the acts of the persons who exercise public affairs and public authority (ABH 1994, 219, 230).

2.2. According to Section 3 para. (2) and (3) of the Act I of 1996 on Radio and Television (hereinafter: "Act on Media"), the freedom of the editors – based on the freedom of expression and the freedom of the press – is restricted with regard to the prohibition of conducts that may lead to the incitement of hatred against the identified groups in the society and that are aimed at insulting or excluding communities. The enforcement of the law abiding conduct can be implemented either in a relation of public law, ex officio, upon the complaint of an administrative body exercising public authority, or in a procedure started upon the complaint of a party whose right has been violated.

The Constitutional Court examined the restriction contained in Section 3 paras (2) and (3) of the Act on Media and acknowledged its constitutionality both in the Decision 46/2007. (VI. 27.) AB and the Decision 1006/B/2001. AB. As established in the Decision 46/2007. (VI. 27.) AB, "broadcast providers, as all subjects of law, must pay respect to the constitutional order, (…) (…) with regard to Section 3 para. (2) of the Act on Media, the legal sanctions applied on the basis of Section 112 para. (1) may play an important role in such a special case in the course of acting against the broadcast providers who do not respect the basic constitutional structure". (ABH 2007, 592, 608) As stressed by the Constitutional Court in both decisions, the authority acting as public authority does not provide individual protection of rights in the course of exercising its controlling powers, i.e. the procedure by the authority does not affect the enforcement of rights by the persons whose inherent rights have been injured due to the broadcast. The authority enforces the respecting of the "fundamental values presented in human rights" and its procedure aims to act against the broadcast providers "communicating any ideology rejecting equal dignity as the fundament of the constitutional order".

In the Decision 1006/B/2001, the Constitutional Court applied the test of relating to the fundamental rights and established that the limitation of the editors' freedom as contained in the Act on Media is necessary on the basis of the causes specified in CCDec1, and the sanction under administrative law is proportionate in comparison with the sanctions under criminal law. [ABH 2007, 1366, 1373-1376.]

2.3. The Constitutional Court interpreted the extent of the fundamental right of the freedom of expression also in the framework of the legal relations under civil law, with regard to the amendment of

the provisions of the Civil Code pertaining to rectification in the press. In the case of injuries committed in the press and regulated among the inherent rights, the Constitutional Court established the restrictability of the freedom of opinion and the freedom of the press on the basis of protecting the honour of the person whose rights have been injured, to be enforced personally. [Decision 57/2001.(XII. 5.) ABH 2001, 484, 495.]

When the injury of rights is the result of expressing an opinion, the protection offered depends on the circumstances of the conduct: in the legal order, both the application of public authority and the individual enforcement of rights are possible, without limiting it to any branch of the law. Thus neither the society, nor the insulted persons are defenceless against the violations of rights committed by way expressing opinions.

The practice of the Constitutional Court is consistent in the respect of stating that the limitability of the freedom of expression and the extent thereof are determined by the intensity of the relation between the insulting conduct and the resulting violation of the subjective rights. Violations of subjective rights justify a more serious restriction of the mother right of communication, while in the cases of the indirect violation of the subjective right or when the injured legal subject is not related at all to the violation of a subjective right, the freedom of expression can only be restricted to a limited extent or cannot be restricted at all.

3. As the setting up of the new statutory definition has been justified by the protection of the human dignity and the general personality rights of those who belong to certain communities, it is necessary to overview in general the Constitutional Court's practice in the field of the rights related to human dignity. The freedom of expression is not an unrestrictable right, and the justification of such restrictions can be raised especially in the case of hate speech. Protecting public order and public peace is a potential justification of the restriction. However, this type of restriction cannot be fully supported on constitutional grounds. Nevertheless, when the hate speech violates inherent rights and there are identifiable victims of such expressions, the restriction is to be assessed from the victims' point of view as well. (CCDec. 1, ABH 1992, 167, 178).

According to Article 54 para. (1) of the Constitution, "in the Republic of Hungary every human being has the inherent right to life and to human dignity of which no one shall be arbitrarily deprived". The Constitutional Court identified human dignity with the general personality right, and regarded it to be undividable in unity with the right to life [Decision 23/1990. (X. 31.) AB, ABH 1991, 88, 93.], and to be unrestrictable as an inherent quality that comes with human life [Decision 64/1991. (XII. 17.) AB ABH 1991, 301, 309.]. Consequently, the right to human dignity guaranteed in Article 54 para. (1) of the Constitution does not connect to the sense of dignity depending on the person's subject, rather it means that under the law, life is acknowledged together with human quality to which inalienable rights are connected.

Therefore, the legally conceivable attributes of dignity inseparable from humans, deducted as fundamental rights by the Constitutional Court from the right to human dignity as the mother right (right to self-determination, the full realisation of the personality, the right to the integrity of personality, the general freedom of action) can only be connected to humans.

As a consequence, it is a necessity that, on the basis of the Constitution and the Civil Code, the Constitutional Court links the right to human dignity – as one of the manifestations of the general personality right – to the natural person as it would be conceptually impossible to interpret this right as the right of persons or groups of persons.

Following clearly from the Constitutional Court's practice detailed in section III.2, sometimes the freedom of opinion and the freedom of expression must give way to the right to honour and reputation deductible from the right to human dignity. The person whose honour was injured due to the expression of the opinion – depending on other circumstances of the conduct – may seek remedy by using the tools

of criminal law, administrative law or civil law, applying the relevant sanctions of the given branch of law.

However, the Constitutional Court does not preclude the possibility of the legal protection of the "dignity" of an individual with regard to his or her relation to a specific community. As referred to in CCDec1, "(…) the protection of the dignity of communities may constitutionally justify the restriction of the freedom of expression". [CCDec1, ABH 1992, 167, 187]
Accordingly, the "dignity of communities" cannot be interpreted as an independent fundamental right. Based on Article 54 para. (1) of the Constitution, natural persons have an inalienable right to be treated as ones with a dignity equal to others' and this is a right to be protected in the legal order. Being a member of a community can be a determining element of an individual's personality. If the expression of the opinion is related to the whole community, connected to the unquestionable, essential feature of the community members and if it is extreme to the extent of questioning even the existence of the community, then the members of the community rightfully expect protection by the legal order. This may imply the necessary restriction of the expression of opinion, but to be constitutional, it must be proportionate with the desired objective.

4. The constitutional review of CCAm requires the demonstration of the characteristics of the civil law regulations pertaining to the protection of inherent rights and the related examination of the contents of CCAm. The Constitutional Court considered it necessary to examine CCAm on the basis of civil law dogmatics to the extent it was needed to assess the motion submitted by the President of the Republic.

As it was pointed out by the Constitutional Court in the Decision 38/1993 (VI. 11.) AB, "the 'law' is finally established by the courts according to their own interpretation." [ABH 1993, 256, 262] Accordingly, the "law" is what the judicial practice unfolds from the legal regulation by way of interpretation, through settling a number of individual legal debates, leaving out other possible contents. The competence of the Constitutional Court includes the evaluation of whether the judicial interpretation remained within the limits set by the Constitution. In the following section, the Constitutional Court shall examine the environment developed in the judicial practice, where the provisions under prior review would become effective.

4.1. In addition to the existing inherent rights, the amendment in question of the Civil Code would establish a new right to be protected. The aim of the legislation is to protect the human dignity of the members of certain groups identified on the basis of a distinctive feature which belongs to the essential elements of personality. Although the legislation specifies some of the distinctive features acknowledged as group-forming factors, the judiciary is empowered to identify and acknowledge further group-forming features. The violation of the right is manifested in dishonouring this feature, performed by way of any "insulting act" in the form of conducts not specified in details.

As an important element of the amendment, the aim of the legislation – rather than acknowledging the group of persons as the victim, and thus establishing a "collective right" – is to provide potential protection for the individual who considers himself or herself to be the member of a community, for the case of the community being insulted. In line with the reasoning of the Bill attached to CCAm, as it is the choice of the individual to belong to a community, the injury of the community caused by way of insulting it is "radiated" over to the individual, together creating due foundations for the individual enforcement of rights.

In addition, there is a statutory presumption as the key element of the new statutory definition, aimed at unquestionably fixing the link created by the law between the violator and the person who defines himself/herself as the victim and who is to act against the injury. The CCAm excludes the possibility of exemption – which is an important element of liability under civil law – by stating that the violator may not refer to the lack of any direct link between the expressed opinion and the person identifying himself/herself as the victim.

Finally, the legislation opens up the possibility of legal protection against the violation of rights not only for the individuals who act as ones belonging to the group of persons, but also for social organisations established for the purpose of protecting fundamental rights in the public interest and not for the protection of subjective rights. CCAm contains limitations in the respect of such organisations only with regard to the sanction applicable in the case of a successful action.

4.2. According to the judicial practice developed in the course of several decades, the relations under civil law in the field of protecting inherent rights show similarities with the features of civil (property) relations. Protecting inherent rights under civil law offers a chance for the individual enforcement of rights in the legal relations established between equal legal subjects. In the field of civil law, the primary role of law is settling, reparation, balancing interests and values: the role of law is first of all to remedy infringed rights, compensate for the damages or to restore the state that existed prior to the injury. Therefore, in contrast with criminal law and administrative law that aim to influence the conduct of persons by using public authority and sanctions, civil law is focusing on offering remedy for the injuries found in the balanced relations between persons of equal rank.

As regulated in Section 75 para. (1) of the Civil Code, “inherent rights shall be honored and respected by everyone. These rights are protected by law.” Consequently, in private law, the whole of the personality is protected in a unified and undividable way, even though, according to the Civil Code, inherent rights are special objects of certain attributes of the personality, and the specific entitlements conceivable and publicly identifiable from the general personality right are specified as particularly protected rights. However, the inner world of the personality, the attributes hidden for the external world are beyond the realm of law.

The protection does exist against all other persons as the legal relations of inherent rights are of absolute structure. The concrete person having inherent rights stands against an indefinable population of the obliged persons, practically everybody. The entitled person – if he/she deems it necessary – may require anyone having a legal entity to respect his or her rights. Acting for the protection of his/her rights is a personal decision based on individual consideration.

These are the principles of civil law along which the judicial practice interprets the provisions on “inherent rights” in Title IV, Chapter VII of the Civil Code. As clarified in the resolutions No. 12 and 13 of the Civil Hall of the Supreme Court and according to the judgements based on those resolutions – passed in cases of rectification in the press, but applied in legal debates related to inherent rights as well – the violation of the inherent rights specified in Section 76 of the Civil Code is not connected to the subjective "feeling" of the person, but it is manifested in signs identifiable for the external world, too: there is a clear and externally conceivable connection between the injuring act and the violation of the person’s inherent rights. In the judicial practice, this requirement is interpreted as being "personally affected". In addition, there is a related rule in Section 85 para. (1) of the Civil Code offering a possibility for the person whose rights have been injured the chance to enforce his/her rights personally. Consequently, in the case of violating the dignity of a community, the person’s “right to act” is excluded not because of the obligation of the personal enforcement of rights, but on the basis of the fact – fixed as a requirement in Sections 75 and 76 of the Civil Code – that inherent rights can only be interpreted in the law in the respect of concrete persons and in cases clearly identifiable by the outer world.

Regulating the above way the protection of the group of persons bearing attributes specified by the legislation and considered to be communities would result in applying the tool of the personal protection of rights for safeguarding communities – an approach deferring from the practice of the European countries with comparable legal systems and history. According to the regulations set up in the early 1990's, in the European countries where the protection of honour was extended to the collective protection of certain communities, the legislation applied the tools of criminal law in most

cases. Civil law is only applied as background regulations providing a set of sanctions for compensations when committing a criminal offence is established.

IV.

1. According to the President's motion, the provisions of CCAm pose disproportionate restriction on the freedom of expression. In this respect, the reasoning of the motion states that the injury of rights can actually be established – by way of the "radiating" over as supported in the statutory presumption – without regard to the intensity of the connection between the group and the individual, within a broad range, provided that the community is in minority. As argued in the motion, another source of disproportionality is the fact that any member of the community as well as social organisations may enforce claims against the expression of opinions insulting the community.

1.1. In terms of the constitutional review to be completed, it is of crucial importance that the chosen identity has insecure borderlines. There can be many types of identities and the externally identifiable manifestations of identity are diverse, and similarly, the legally conceivable aspects of it are insecure. All human identity marks (political, cultural, sexual, ethnic, historical and geographical ones etc.) are formed in the course of the series of life events, and such events are only partially directed by the individual within certain limits, at the same time, the experiences gained are necessarily incorporated into one's personality. Thus the right of self-determination is not manifested in selecting the events of life but in the person realising and acknowledging it, as well as taking it on or representing it towards the outer world. The external world and the law may not qualify the confessed identity of the individual and may not force him or her to distance himself/herself from that identity or to adopt another one.

In the standing practice of the Constitutional Court, the religious conviction and belonging to a minority group have been specified as attributes determining the essential features of the personality. In the Decision 4/1993. (II. 12.) AB, the Constitutional Court interpreted the freedom of conscience as a right to the integrity of the personality and established that "the freedom of conscience and religion acknowledges that the person's conviction and within this, in a given case, religion is a part of human quality, so their freedom is a precondition for the free development of personality" [ABH 1993, 48, 51]. "Religion (…) is, for the individual believer, something that concerns and defines all of his/her life and his/her personhood" [ABH 1993, 48, 65].

In the Decision 22/1997. (IV. 25.) AB, the Constitutional Court also interpreted the state of belonging to a national or ethnic minority as feature determining all fields of life and the fullness of one's personality [ABH 1997. 107, 116]. The same point was reinforced in the Decision 45/2005. (XII. 14.) AB on the election of minority self governments [ABH 2005, 569.].

In these cases the collective right(s) acknowledged for the religious and national, ethnic minorities mean(s) acknowledgement as communities as well. However, for the individuals belonging to such communities, the enforcement of the subjective rights resulting from their status does not mean any action against the society, but it is about the well-founded and constitutionally justified positive discrimination of the community together with active State actions and the obligation of the State to safeguard institutions.

The amended Section 76/A para. (1) of the Civil Code lists the inherent subjective rights the subject of which can only be a natural person. However, the wording of the relevant paragraph does not end with a reference to the single individual but with the term "referring to the scope of persons having such characteristics in minority within the society". The provision under review becomes "subjectless" because of the formulation of the contents of the listed subjective rights: the right to decide on the enforcement of claims resulting from the injury. Consequently, according to CCAm, the dishonouring conduct is realised in the relation of communities, and these communities qualify – in terms of their members and their composition – as legally non-delimitable groups of persons, having no identifiable

legal entity, formed on the basis of attributes specified in the Act of Parliament in a taxative manner. Thus they have no rights “to be violated”. On the one hand, the list declares with normative force certain group-forming attributes “prone to be violated” and on the other hand it opens up the way to have other similar attributes acknowledged by way of interpreting the law. As the undertaking and the confession of one’s identity is a question of individual decision, belonging to a group is “verified” by the unquestionable statement made by the community member.

In Section 1 para. (1) of CCAm, acting as the member of the community grants the enforcement of a right against “others” i.e. against all the other people, to the detriment of “others’” freedom of expression. The enforcement of the right is based on the confession of one’s identity, the declaration of belonging to a community, i.e. the individual’s right of self-determination, and in this respect the only legal requirement that could be raised is acting in good faith. It would be impossible to apply any external control, doubt or obligation of verification regarding the confessed identity and the connection between the individual and the given community. Regarding the multitude of the attributes determining the personality and being suitable for forming groups, and taking into account the possibility of individual action based on self-determination, the method of the regulation concerned creates practically unlimited possibilities for the restriction of the freedom of expression rather than narrowing it down to the minimum.

1.2. The statutory presumption set up in Section 1 para. (2) of CCAm – breaking up the absolute structure of the legal relations under civil law referred to in point 4.2 – rather than focusing the protection directly on the inherent right of the individual, concentrates on the attribute holding together the group of persons, and the attribute is projected by the legislation to the personality of the concrete person by supposing that it forms part of the personality. This is how – taking into account the dogmatic requirements of civil law, still in an indirect way – the legislation constructs the inherent right to be protected in the sense of civil law. By way of the projection – in a transposed manner – it makes the group of persons be the addressee of the insulting conduct, but the concrete person(s) become(s) entitled to enforce the right. The person performing the challenged conduct may not raise doubts about the above relation because of the incontestable statutory presumption. Thus the only way to become exempted from the liability resulting from the violation of the right is to refer to the general rules of protecting honour and human dignity as elaborated in the judicial practice. It is clear from the application in CCAm of the technique of projection, or “radiating over” as termed in the reasoning of the Bill, that the violation of the right does not cause an injury in the subjective right of a concrete person, as it can only be deducted as the indirect result of an incontestable statutory presumption. The subject of the protection is the abstract concept – created by the law – of the collective dignity of the community members.

As explained in details by the Constitutional Court in point III.4.2., in the respect of the protection of inherent rights, the Civil Code protects the person whose subjective rights have been injured, in the case of the personal enforcement of rights. Without regard to the public value judgements expressed about the activities of those who exercise public authority, the expression of one’s opinion can only lead to the violation of rights if the expression contains an unreasonably insulting or dishonouring value judgement (BH 2006. 397; EBH 2006. 1397).

In the case of the statutory provision under review, anyone who considers himself or herself to belong to the community may enforce the right without regard to the actions of other community members. CCAm does not preclude the possibility of parallel claims and the chain of subsequent litigations, thus opening up the way for imposing multiple liability and material responsibility on the perpetrator whose conduct violates CCAm. Accordingly, the same injuring conduct could be assessed and sanctioned as much times, as many persons consider – taking the opportunity of projecting – the expression of the opinion manifested in dishonouring the community to be an insulting affair.

However, at the same time, Section 1 para. (3) of CCAm entitles social organisations or foundations of public interest or of paramount public interest to enforce claims against the insulting conduct. This way the legislation opens up the way for parallel or subsequent enforcement of claims by the members of the community and by the organisations acting in the public interest. The above direction of the modification reaches beyond the scope of the protection of subjective rights and of the abstract human personality, referring to the almost endless realm of human and civil rights.

According to the reasoning of the Bill, the possibility of the public interest enforcement of claims is based on precedents in consumer protection and environmental regulations. The regulations referred to in the reasoning – offering a chance for further litigation in the public interest – acknowledge, in each case, a public interest in the form of objectives undertaken by – and specified in the statutes of – the social organisation, where those interest cannot be realised by way of enforcing subjective rights or when such realisation cannot be effective. Indeed, in the case of inherent rights, it is a special feature of the legal relation that a subjective right, based on a personally suffered injury, is enforced, therefore it was necessary for the legislation to transform the community's injury into a subjective right. This way, rather than enforcing the right of the community, the persons entitled to act enforce the injured rights that have become their own rights. In this context, enforcing rights in the public interest by a social organisation is not reasonable, and on the other hand, it is unconstitutional because of the unlimited possibility of enforcing claims – just as explained above – granted for the social organisations as well. The solution taken by the legislation is incompatible with the requirement of legal certainty as CCAm applies human and civil rights together with constitutional fundamental rights and inherent subjective rights in an unclear way, which makes the protection of the rights borderless both in the subjective sense and regarding its contents as well.

According to the arguments in points 1.1 and 1.2, any liability for the violation of an abstract legal subject specified by the law, where the sanctions can be applied in a parallel or repeated way – in line with Section 84 of the Civil Code – results in the disproportionate restriction of the freedom of the expression of opinion. The above method of the regulation is also in conflict with the test of fundamental rights, requiring the legislation to apply the least severe tool necessary for the realisation of the desired objective. Although civil law sanctions are not considered to be *"ultima ratio"* in the liability hierarchy of the legal system, the forced defendant position in subsequent litigations, the possibility to establish the injury of rights several times and the multiple obligation of giving compensation in public, as well as the substantive (material or non material damages) sanction depending on judicial discretion extend beyond the legislative obligation of applying the "most moderate means", therefore it violates Article 8 para. (2) and Article 61 para. (1) of the Constitution.

As explained above, CCAm actually creates a special "actio popularis" in the field of inherent rights, by opening up the possibility of enforcing rights for individual, group-level and all-social interests at the same time. The Constitutional Court points out that such an unnecessary, borderless *actio popularis* disproportionately restricting the practicing of the fundamental right may lead to the deformation and the changed interpretation of the legal institution the establishment and the operation of which falls into the State's obligation of institutional protection.

2. According to Section 1 para. (1) of CCAm, the community, as the basis of the protection of personality, is characterised not only by the attribute turned into a part of the personality of the community members, but also by being a minority within the society. Thus the regulation does not only aim to protect the dignity of the given communities, but it focuses in particular on protecting the dignity of the communities in minority.

The Constitutional Court follows its established practice with regard to the constitutional standard on the positive discrimination applied in the case of subjective rights. "The prohibition of discrimination means all people must be treated as equal (as persons with equal dignity) by law – i.e., the right to

human dignity may not be impaired, and the criteria for the distribution of the entitlements and benefits shall be determined with the same respect and prudence, and with the same degree of consideration of individual interests." [Decision 9/1990. (IV. 25.) AB, ABH 1990, 46, 48] In the case of subjective rights, any regulation containing different rules – without any reasonable justification on the basis of objective assessment, i.e. in an arbitrary manner – regarding the members of a homogeneous group within the given regulatory concept is in conflict with the prohibition of discrimination. [First established in: Decision 61/1992 (XI. 20.) AB, ABH 1992, 280, 281] In fact, such regulations violate the fundamental right of human dignity as in these cases the affected persons are surely not treated by the legislation as ones of equal dignity and their aspects are not assessed with the same circumspection, attention and fairness. Such a regulation is considered "unconstitutional even within positive discrimination" [Decision 35/1994. (VI. 24.) AB, ABH 1994, 197, 200.].

In the present case, the new inherent right created by the regulation is based upon the assumption that it is possible to acknowledge attributes incorporated into the personality and at the same time bearing a function a community forming. Based on objective assessment, there is no ground to assume that the group forming features can only characterise minority groups of persons. Still the legal tools of protection are only granted for the members of minority groups. Consequently, when the subject of the protection is an attribute of a community which is in majority compared to the whole of the society, the persons who consider themselves to be members of that community are practically left without protection because of their majority in terms of numbers. It means that the affected individuals are not treated by the regulation as persons of equal dignity, although the differentiated treatment is not based on a reasonable justification according to objective assessment.

Therefore the Constitutional Court established that the provision under review violates Article 70/A para. (1) of the Constitution.

3. According to the petition submitted by the President of the Republic, Section 1 para. (3) of CCAm violates the principle of the right of self-determination in litigation deducted from the fundamental right to human dignity, as the relevant provision empowers social organisations or foundations of public interest or of paramount public interest to start litigation in the case of an injury of rights regulated in Section 1 para. (1).

As argued in the reasoning of the Bill of CCAm, it is necessary to grant in Section 1 para. (3) a public interest right to start litigation for social organisations acting in the field of protecting rights as the scope of victims is a community and – indirectly – the whole society. According to the legislation, this right to file a claim is similar to the same public interest action regulated in consumer protection and environmental laws.

In the Decision 1146/B/2005. AB, the Constitutional Court reviewed the regulation in Section 98 para. (1) and Section 99 para. (1) item b) of the Act LIII of 1995 on the general rules of protecting the environment (hereinafter: APE) and established that it was constitutional. As established by the Constitutional Court, the right to start action granted in Section 99 para. (1) of APE for associations set up for the protection of the interests of the environment and for other social organisations not classified as political parties or unions is not a right based on Article 57 para. (1) of the Constitution as those organisations are not empowered to remedy the injuries of individual rights. In their case, the justification of starting a legal action is "acting in the interest of the public, to protect a constitutional objective and value": the fundamental right to the environment [ABH 2006, 1849, 1851]. As held by the Constitutional Court earlier regarding the interpretation of Article 18 of the Constitution, the right to a healthy environment (…) primarily constitutes the independent and self-contained institutional aspect in itself of the protection of that right, or, it is, a distinct fundamental right exceedingly dominated and determined by its objective aspect of institutional protection." The Constitutional Court established that the subjective rights in the field of the protection of the environment are predominantly

of procedural nature, to be exercised by the entitled parties in procedures at the authorities [Decision 28/1994. (V. 20.) AB, ABH 1994, 134, 138-139].

According to Section 39 of the Act CLV of 1997 on Consumer Protection (hereinafter: ACP), social organizations providing representation of consumer interests (or the consumer protection authority, the public prosecutor and, in the respect of specific services, the Hungarian Financial Supervisory Authority) may file a claim – i.e. start a procedure – against any party causing harm to a wide range of consumers or causing them substantial harm. The claim can also be filed in the cases when the identity of the harmed consumers cannot be established and filing the action is independent from the enforcement of subjective rights by the harmed consumers. Accordingly, the social organisation, rather than protecting the subjective rights of the consumer, acts in the public interest in order to enforce a constitutional objective or value in line with the nature of the organisation.

Based on the nature of inherent rights, they can only be enforced personally. Actually the "dignity" of belonging to a community has been transformed into an individual subjective right just because to make it enforceable as an inherent right in the relations under civil law. Consequently, the enforcement of inherent rights is a question falling in the realm of the individual's autonomy. Therefore a social organisation may not enforce the rights of the insulted community – and indirectly the rights of the whole society – on the basis of an individual injury of rights as only the persons belonging to the community possess the inherent rights insulted upon. Inherent rights can only be enforced by the person, who – based on his/her subjective right – may decide whether or not to use the judicial way to enforce the right, and what kind of claim to enforce if he/she decides to do so. If the regulation empowers a social organisation to enforce such rights without regard to the decision of the person enjoying the subjective right, the consequence is the unnecessary and disproportionate restriction of the individual autonomy [Decision 1/1994. (I. 7.) AB, ABH 1994, 29, 35-36; Decision 20/1997. (III. 9.) AB, ABH 1997, 85, 90-91].

Accordingly, Section 1 para. (3) of CCAm violates Article 54 para. (1) as well as Article 8 para. (2) of the Constitution.

The statements made in the respect of the constitutional review of CCAm do not question the necessity to protect the members of different communities; the Constitutional Court has merely established that the President’s motion is well founded regarding the proportionality of such protection. The regulatory method in question, the multitude of projected attributes, the unlimited application of the technique of “radiating over”, as well as the statutory presumption about the intensity of the relation between the individual and the community on the basis of those attributes do not pass the fundamental rights’ test that has been applied by the Constitutional Court so far.

The Constitutional Court publishes this Decision in the Hungarian Official Gazette (*Magyar Közlöny*) in view of the establishment of unconstitutionality.

Budapest, 30 June, 2008.

Dr. Mihály Bihari
President of the Constitutional Court

Dr. Elemér Balogh
Judge of the Constitutional Court

Dr. András Bragyova
Judge of the Constitutional Court

Dr. András Holló
Judge of the Constitutional Court

Dr. László Kiss
Judge of the Constitutional Court

Dr. Péter Kovács

Dr. István Kukorelli

Judge of the Constitutional Court

Dr. Barnabás Lenkovics
Judge of the Constitutional Court

Dr. Péter Paczolay
Judge of the Constitutional Court, Rapporteur

Judge of the Constitutional Court

Dr. Miklós Lévay
Judge of the Constitutional Court

Dr. László Trócsányi
Judge of the Constitutional Court

Concurring reasoning by *Dr. László Kiss*, Judge of the Constitutional Court

I agree with the holdings of the majority Decision.

However, I do not agree with the reasoning of the Decision in the respect of the Constitutional Court's failure to address certain general questions and connections that – in my view – would have been indispensable for judging upon the motion submitted by the President of the Republic (including the present meaning and the content of the right to express one's opinion, the question of the dignity of communities and presenting the trends experienced in the Hungarian judicial practice). My opinion about the above issues can be found in details in my dissenting opinion attached to the Decision 236/A/2008 AB.

Budapest, 30 June, 2008.

Dr. László Kiss
Judge of the Constitutional Court

Concurring reasoning by *Dr. Péter Kovács*, Judge of the Constitutional Court

I agree with the holdings of the Decision and I also agree with establishing in the Decision that the solution of legal technique applied in CCAm does not meet the constitutional requirement of the clarity of norms, thus violating Article 2 para. (1) of the Constitution on the criteria of the rule of law. In my opinion, the excessively broad delimitation of the scope of victims, the similar treatment of the groups of persons showing significant differences in terms of their history, their social background, their origin and aspects of sociology, and the constructing of a *locus standi* practically resembling to *actio popularis* poses a disproportionate restriction on the freedom of expression and opinion.

At the same time, I maintain here as well all the detailed arguments about the rules of international law in the light of which the holdings and the axioms of CCDec1, CCDec2 and CCDec3 are to be examined, as found in my concurring reasoning attached to the Decision 236/A/2008 adopted this day on the motion by the President of the Republic requesting the prior constitutional review of the criminal offence of "verbal abuse".

Budapest, 30 June, 2008.

Dr. Péter Kovács
Judge of the Constitutional Court

Concurring reasoning by *Dr. László Trócsányi*, Judge of the Constitutional Court

I agree with points IV.2 and 3 of the Decision, thus the Act adopted by the Parliament on the 29th day of October, 2007 on the amendment of the Act IV of 1959 on the Civil Code is unconstitutional, but in my opinion the planned amendment of Section 76/A paras (1) and (2) of the Act IV of 1959 on the

Civil Code do not violate Article 8 para. (2) of the Constitution and Article 61 para. (1) of the Constitution on the freedom of expression.

According to Section 85 para. (1) of the Civil Code, inherent rights can only be enforced personally (with some exemptions irrelevant with regard to the present Decision). Although the grammatical interpretation of this regulation only prohibits starting of action by a person for an injury that has harmed another person, this prohibition is construed broadly in the judicial practice.

The judicial practice is based upon the resolution No. PK 432 of 1984 of the Supreme Court and, in particularly with regard to the subject of the present Decision, on its resolution No. 433 (renumbered as resolutions No. 12 and 13 in the resolution No. PK 444) pertaining to litigation in cases of rectification in the press, but also applied in litigations related to inherent rights. According to the resolution No. PK 13, Section 85 para. (1) of the Civil Code regulates the right to start action by providing that litigation may be started by any person whose identity is referred to in the press communication – either by way of specifying his/her name or otherwise – ore whose identity can otherwise be recognized from the content of the communication.

Consequently, the present consistent judicial practice of ordinary courts does not offer legal protection against collective defamation as it only empowers the persons directly insulted in their personality to start an action and the position of being affected through a community is not acknowledged in the context of litigations related to inherent rights. In practice, Section 76/A paras (1) and (2) of the Civil Code make it clear that – in contrast with the narrowing interpretation of the ordinary courts – the insulted person has a right to start an action under civil procedure in the case of a collective defamation.

The rights protected in Section 76/A para. (1) of the Civil Code are typically manifested in belonging to a community. The individuals' right to consider and declare himself or herself as one belonging to a group – let it be a national/ethnic/religious etc. one – is an integral part of the individual's human dignity. The injury of the community – depending on the relation between the individual and the community and the intensity of the link – may also be considered as an insult of the individual's personal right to be part of the community, i.e. the insult can be ”radiated over”.

Earlier the Constitutional Court has identified two attributes that on the one hand determine the whole personality and on the other hand are group-forming attributes as well, i.e. the characteristics of the group should be applicable to all members. These two attributes are the religious conviction and the belonging to a national or ethnic minority. Consequently, in these respects the Constitutional Court has already acknowledged the group membership as an essential element of the personality of the individual. However, there can be other groups as well, the insulting of which radiates over the personal dignity of each and every group member. If indeed, the group is formed on the basis of the fact that its members have certain objective – potentially externally visible or natural-born, inalienable – attribute not affecting the social function or the role of the members, making them distinct from others; and if the insult is aimed in particular at this group-forming attribute, then one may assume that the sole aim of insulting the group is to express the inferiority of the community in question or it is aimed at questioning the group identity. Section 76/A para. (1) of the Civil Code as regulated in CCAm adds some other attributes to the above ones that have already been subjects of positive discrimination in the Constitutional Court's practice, and the new attributes are related to individual liberty just as the former ones, i.e. the right to demonstrate and declare these features is also rooted in personal liberty, therefore it is a fundamental right as the right to human dignity.
In my view, the assumption that the judicial application of even Section 76/A para. (1) of the Civil Code as amended by CCAm might lead to disproportionality, does not result in making Section 76/A

paras (1) and (2) violate Article 8 para. (2) and Article 61 para. (1) of the Constitution. It is the duty of the courts and finally of the Supreme Court to elaborate in the judicial practice the legal protection test of collective defamation / the aspects related to the intensity of “radiating over”. In that respect, the judicial practice may specify aspects as

(a) the concrete injury of the right should affect a community fundamentally determining the individual's life situation, provided that the individual is unable to terminate his/her membership in that community or it would result in giving up his/her human dignity (self-abdication) or in gravely injuring his/her dignity;

(b) is the concrete injury – according to the value judgement of the society – suitable of raising fear of the repetition of the injury in the members of the insulted community.

Although the legislation failed to regulate the handling of potential disproportionalities that may result from parallel actions, this is a failure of legislative technique not reaching the level of violating the rule of law as contained in Article 2 para. (1) of the Constitution and it is a problem to be solved in the judicial practice of the ordinary courts.

Budapest, 30 June, 2008.

Dr. László Trócsányi
Judge of the Constitutional Court

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