DECISION 34/2004 (IX. 28.) AB

IN THE NAME OF THE REPUBLIC OF HUNGARY

On the basis of a petition seeking a posterior review of the unconstitutionality of a statute, the Constitutional Court has adopted the following

decision:

1. The Constitutional Court holds that it is a constitutional requirement resulting from Article 61 para. (1) of the Constitution that, in the application of the text "to libel and defamation" in Section 4 of Act LV of 1990 on the Legal Status of Members of Parliament, the immunity of Members of Parliament be extended to the expression of opinion – containing a value judgement related to debating public matters – by Members of Parliament concerning a fellow Member of Parliament, another person exercising public authority, or a politician acting in public. Furthermore, it is a constitutional requirement to be followed during the procedure for suspending the right to immunity that, in the case of stating or disseminating a fact capable of offending the honour of a politician acting in public, or using an expression directly referring to such a fact, the right to immunity of the Member of Parliament be only suspendable if the Member of Parliament knew that his or her statement was essentially false.

2. The Constitutional Court rejects the petition seeking the establishment of the unconstitutionality and the annulment of the text "to libel and defamation" in Section 4 of Act LV of 1990 on the Legal Status of Members of Parliament.

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

Reasoning

I

The Constitutional Court received a petition for the partial annulment of the second sentence in Section 4 of Act LV of 1990 on the Legal Status of Members of Parliament (hereinafter: the AMP). According to the petitioner, the freedom of expression enshrined in Article 61 para. (1) of the Constitution and the right to have access to information of public interest are violated by the provision of the AMP which provides that, in the course of acting as a member of the legislative body, a Member of Parliament may be held accountable for a fact or opinion communicated by him or her, if such fact or opinion qualifies as libel or defamation. It is stressed in the petition that "the fact of the Republic of Hungary being a democratic state under the rule of law does not mean that a Member of Parliament serving the public interest and acting on the basis of popular sovereignty may not question the conduct of public actors who may have acted unlawfully". In the petitioner's opinion, in the interest of the purity of public life, public actors have to tolerate more criticism than private individuals.

II

The Decision of the Constitutional Court is based on the following provisions of the Constitution:

"Article 20 para. (2) Members of Parliament shall carry out their duties in the public interest.

(3) Members of Parliament are granted parliamentary immunity, in accordance with the regulations of the law defining the legal status of Members of Parliament."

"Article 27 Any Member of Parliament may direct a question to the Ombudsman for Civil Rights and the Ombudsman for the Rights of National and Ethnic Minorities, to the President of the State Audit Office and the President of the National Bank of Hungary, to the Government or any of the Members of the Government, as well as to the General Prosecutor on matters which fall within their respective sphere of authority." "Article 61 para. (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."

The provision of the AMP challenged by the petitioner is as follows:

"Section 4 Members of Parliament and former Members of Parliament may not be held accountable at court or at any other authority on the basis of the votes cast by them, or a fact or opinion communicated by them in the course of exercising their mandates as Members of Parliament. This exemption shall not apply to the violation of state secrets, to libel and defamation, and to the liability of Members of Parliament under civil law."

The provision of the AMP granting immunity for Members of Parliament is as follows:
"Section 5 para. (1) Members of Parliament may only be detained upon being caught in the act, and criminal proceedings or administrative infraction proceedings may only be instituted or conducted, and a coercive measure in the criminal proceedings may only be applied against a Member of Parliament with the prior consent of the Parliament."

The provisions of Act IV of 1978 on the Criminal Code (hereinafter: the CC) referred to in the Decision are as follows:

Libel

"Section 179 para. (1) Anyone who in front of another person states or disseminates a fact capable of offending the honour of another person, or uses an expression directly referring to such a fact, commits a misdemeanour and is to be punished by imprisonment for up to one year, public labour or a fine.
(2) The punishment shall be imprisonment for up to two years, if the libel has been committed
a) for a base reason or purpose,
b) in front of a large public,
c) in a manner causing considerable injury to interests."

Defamation

"Section 180 para. (1) Anyone who – except for the case defined in Section 179 – uses an expression or commits an act capable of offending the honour of another person
a) in connection with the job, exercise of public mandate or activity of public concern of the injured party,
b) in front of a large public,
is to be punished for misdemeanour by imprisonment for up to one year, public labour or a fine.
(2) A person who commits defamation by assault shall be punishable in accordance with paragraph (1)."

The provision of Act LXIX of 1999 on Administrative Infractions (hereinafter: the AAI) referred to in the Decision is as follows:

Defamation

"Section 138 para. (1) Anyone who uses an expression or commits an act capable of offending the honour of another person shall be punishable with a fine of up to fifty thousand forints."

III

In the course of its procedure, the Constitutional Court examined the constitutional regulations on the immunity of Members of Parliament in certain constitutional democracies, and took into account the decisions of the European Court of Human Rights pertaining to the freedom of expression of Members of Parliament.

1. England is the "homeland" of the freedom of speech in the Parliament as a legal institution ensuring the freedom of parliamentary life and the independence of the expression of the will of legislators, where it has been a legal institution supported by the king since 1541, guaranteed in Article 9 of the Bill of Rights, adopted in 1688, as follows: "The freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament." In English law, matters related to the freedom of speech of Members of Parliament are judged by the Parliament acting as a disciplinary forum. Article I Section 6 of the Constitution of the United States grants the right to immunity to the Members of the Congress by essentially taking over the English tradition. "The Senators and Representatives shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place." American law does not have an institution of suspending the right to immunity, and the content of the above constitutional provision has been developed in the judicial practice.

2. The right to immunity as applied in the continental legal systems is twofold, on the one hand – as a substantive rule – it excludes holding Members of Parliament accountable for actions performed in the course of exercising their profession as members of the legislative body (exemption from liability, immunity), and on the other hand – as a procedural rule – it

requires the consent of the Parliament for instituting proceedings for the establishment of the liability of the Member of Parliament for actions committed by the member of the legislative body outside the above capacity (inviolability). In the European democracies examined by the Constitutional Court, the immunity of Members of Parliament is regulated in the Constitution, and most of the Constitutions do not provide for rules narrowing down the exemption from liability of Members of Parliament.
Article 68 of the Constitution of Italy, Article 71 para. (1) of the Constitution of Spain, Article 57 para. (1) and Article 58 of the Constitution of Austria, Article 26 of the Constitution of France, Article 58 of the Constitution of Belgium – worded almost identically to the French text –, Article 75 para. (2) of the Constitution of Croatia, Article 83 of the Constitution of Slovenia and Article 69 of the Constitution of Bulgaria grant immunity to Members of Parliament without providing for any exceptions. Similarly, Article 66 of the Constitution of Norway as well as Articles 15.10 and 15.13 of the Constitution of Ireland grant absolute immunity to Members of Parliament.

There are, however, constitutions in Europe that define conditions narrowing down the exemption from liability of Members of Parliament. Pursuant to Article 105 of the Constitution of Poland, a Deputy shall not be held accountable for his activity performed within the scope of a Deputy's mandate during the term thereof nor after its completion. However, a Deputy can be held accountable before the Sejm and, in a case where he has infringed the rights of third parties, he may be proceeded against before a court with the consent of the Sejm. Article 28 of the Constitution of Latvia provides that court proceedings or proceedings before another authority may be brought against members of the Saeima if they, albeit in the course of performing parliamentary duties, disseminate defamatory statements which they know to be false, or defamatory statements about private or family life. According to Article 46 of the Constitution of Germany, a deputy may not at any time be subjected to court proceedings or disciplinary action or otherwise called to account outside the House of Representatives [Bundestag] for a vote cast or a statement made by him in the House of Representatives [Bundestag] or in any of its committees. This does not apply to defamatory insults. The latter rule refers to Section 187 of the German Penal Code, according to which whoever, against his better judgment, asserts or disseminates an untrue fact in relation to another, which maligns him or disparages him in the public opinion or is capable of endangering his credit, shall be punished with imprisonment for not more than two years or a fine. Committing the act publicly, in a meeting or through dissemination of writings qualifies

as an aggravated case of the crime. Thus, in the above case, libel concerns the statement of facts, and the perpetrator must know that the fact stated or disseminated by him or her is false.

3. As it can be established on the basis of the foregoing, in the constitutional democracies examined, the right to immunity of Members of Parliament is typically guaranteed in the respective constitution, and the extent and content thereof is also regulated in the respective constitution. In several constitutions, the immunity of Members of Parliament is not restricted; they protect any statement made by a Member of Parliament in his or her capacity as a member of the legislative body. In some European democracies, the immunity of Members of Parliament is guaranteed by the respective constitution, but the constitution itself provides for certain exceptions; for example, insults violating the rights of a third person, statements affecting privacy or knowingly false statements are not subject to immunity.

4. The expression of political opinion, more specifically the freedom of speech in parliament, is also protected by Article 10 of the European Convention on Human Rights, and, according to the consistent practice of the European Court of Human Rights, acts or omissions of the government may be thoroughly examined by the legislator, the judicial authority, the press and public opinion. The European Court of Human Rights emphasised in the Castells case that while the freedom of expression is important for everybody, it is especially so for an elected representative of the people, who represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition member of parliament, like the applicant, call for the closest scrutiny on the part of the Court. (Eur. Court H. R., Castells v. Spain, Judgment of 23 April 1992, Series A no 236, para 42.; confirmed by: Eur. Court H. R., Piermont v. France, Judgment of 27 April 1995, Series A no 314, para 76.) As a result of the above scrutiny, the European Court of Human Rights pointed out that the State of Spain had applied an unnecessary sanction under criminal law against the Member of Parliament who had written a newspaper article criticising the government, violating Article 10 of the European Convention on Human Rights protecting the freedom of expression. Furthermore, it stated that although Senator Castells could have expressed his opinion at a parliamentary session ensuring unlimited immunity for him, the fact that he had published his article criticising the government in a newspaper had not deprived him of the right to criticise the government. In a recent decision, the European Court of Human Rights reinforced the above, adding that the special protection of the freedom of expression is justified not only in the case of

parliamentary speeches, otherwise covered by unlimited immunity, but at the level of local authorities as well: at the general assemblies and at the sittings of the elected representatives of local governments, serving as important places for political debates. (Eur. Court H. R., Jerusalem v. Austria, Judgment of 27 February 2001, Reports of Judgments and Decisions 2001-11, para 36-40.; confirmed by: Eur. Court H. R., Cordova v. Italy, Judgment of 30 January 2003, para 60.)

The European Court of Human Rights established in the Case of A. v. the United Kingdom – stressing the importance of the freedom of parliamentary debate and that of separating the legislative and judicial powers – that the absolute immunity of Members of Parliament does not violate Article 6 of the Convention granting the right to the judicial way. (A. v. the United Kingdom, Judgment of 17 December 2002)

IV

1. In Hungary, the right to immunity had been enforced for a long time through the freedom of debate and the legal institution of "salvus conductus" (the freedom of Members to appear in the Parliament). The right to immunity was first regulated in detail in 1867, however, Sections 47-48 of Act 1867:XII only regulated the right to immunity of members delegated into the Parliament's committee on common matters. In the development of the right to immunity, another important step was the parliamentary resolution adopted on 18 November in the same year, determining the content of the right to immunity for a long time. In Hungarian public law, this parliamentary resolution has served up to today as a source of and explanation for the right to immunity, guaranteeing the freedom of expression in the Parliament, establishing that "a Member of Parliament may only be held accountable by the Parliament – more specifically by the House of the Parliament to which he belongs – for any statement or act made inside or outside the House by the Member of Parliament in his capacity as such", and that proceedings against a Member of Parliament on the ground of his other acts may only be instituted with the prior consent of the House. On the basis of Section 3 para. (1) of Act 1920:I, the rules of immunity under customary law were applicable to Members of the National Assembly as well, and Section 2 para. (1) of Act 1945:XI "provides the same right to immunity for Members of the National Assembly as the one granted to Members of Parliament".

Section 1 of the Standing Orders of the National Assembly of the year 1946 guaranteed the substantive rules of the right to immunity by referring to Act 1945:XI, it regulated the most important issues related to immunity proceedings and set up an independent committee on immunity (Section 47).
The text of the Constitution established by Act XXXI of 1989 – although it contained the substantive rules on the right to immunity – only regulated inviolability, as one of the forms of the right to immunity. According to the original text of Article 20 para. (3) of the Constitution, "A Member of Parliament shall not be arrested, and no criminal proceedings shall be instituted against him without the consent of the Parliament, save if caught in the act."
Together with the AMP, the Parliament adopted Act LIV of 1990 amending the text of the Constitution, which authorised the Parliament to adopt a modern regulation on all aspects of the right to immunity, including exemption from liability as well.

Thus, in contrast with most constitutions, the Hungarian Constitution authorises the legislative branch to regulate all substantive and procedural aspects of the right to immunity declared in the Constitution. However, in the opinion of the Constitutional Court, the above authorisation to regulate does not allow the statutory concept of the right to immunity to become independent from the entire constitutional order, in the present case particularly from Article 8 para. (2), Article 20 paras (2) and (3), Article 27 and Article 61 para. (1) of the Constitution, and it may not lead to emptying the content of the right to immunity or to the unconstitutional restriction of the freedom of speech in the Parliament.

2. The essence of the system of representation based on free mandates, deducible from Article 20 para. (2) of the Constitution and from Article 20/A para. (1), listing the cases of termination of the Member of Parliament's mandate, is the Member of Parliament's mandate legally independent from the voters and solely depending on the Parliament. Given such a mandate, the Member takes a stance in Parliament freely, based on his conviction and conscience, and votes accordingly. During his term the electorate cannot hold him accountable for his activities, that is his mandate lasts for the entire duration of the term of the Parliament and may not be shortened by the electorate. [Decision 2/1993 (I. 22.) AB, ABH 1993, 33, 37-38] The independence of the Member of Parliament, resulting from the autonomy of the Parliament, is primarily guaranteed by the legal institutions of the right to immunity and incompatibility. The right to immunity is a right enjoyed by the Member of

Parliament as a member of the legislative body in order to ensure the free and independent operation of the Parliament without influence by the executive and judicial branches. The will of the legislator can only be freely expressed if the Members of Parliament may only be subsequently held liable by the legislative authority on account of the work done and statements made by them in their capacity as Members of Parliament.

"The right to immunity is a right related to the legal status of Members of Parliament, enjoyed by them not as citizens, but as Members of Parliament. Although this right is enshrined by the Constitution as a right of Members of Parliament, it also serves the purpose of protecting the Parliament against other branches of power. Although the right to immunity is manifested as a personal right of the Member of Parliament, he or she may not dispose over that right, he or she has no possibility to waive it – save in the case of administrative infraction proceedings – and he or she has to refer to his or her right to immunity in the course of the proceedings. Disposing over the right to immunity and the suspension thereof – in the scope of inviolability, where allowed by the AMP – is the right of the Parliament." [Decision 65/1992 (XII. 17.) AB, ABH 1992, 289, 291-292]

According to Article 20 para. (3) of the Constitution, Members of Parliament have a right to immunity in line with the provisions of the AMP. According to Section 4 of the AMP, exemption from liability applies to work done as a Member of Parliament; [Decision 7/1997 (II. 28.) AB, ABH 1997, 72, 75] the right to immunity of the Member of Parliament may not be suspended on account of his or her vote cast, or a fact or opinion stated in the course of exercising his or her mandate. The AMP excludes acts constituting any of three criminal offences – violation of state secrets, libel, and defamation – as well as liability under civil law from the scope of immunity.

According to the Parliament's Resolution in Principle 1/1991 (XII. 4.) interpreting this statutory provision, in such cases there is no obstacle under substantive law that prevents the holding of the Member of Parliament accountable. After discussing the draft resolution submitted by the Committee on Immunity, Incompatibility and the Examination of Mandates, the Parliament acts as a special "court", adopting a resolution with the two-thirds majority of the Members present on maintaining or suspending the right to immunity of the Member concerned.

V

In the present case, the Constitutional Court had to decide whether there is a constitutional justification for withdrawing all forms of the criminal offences of defamation and libel as well as the administrative infraction of defamation from the scope of the exemption from liability of Members of Parliament.

1. The second sentence in Section 4 of the AMP limiting the exemption from liability of Members of Parliament restricts Article 61 para. (1) of the Constitution enshrining the freedom of expression, and more specifically the free debating of public matters.

The Constitutional Court has confirmed in several decisions the prominent role of the right to the freedom of expression, as well as its being a mother right, emphasising that this privileged role of the right to the freedom of expression does not mean that this fundamental right may not be restricted, but it necessarily entails that the right to the freedom of expression must only give way to very few rights; it may only be limited by Acts of Parliament in a few exceptional cases, in order to protect another fundamental right or other constitutional value. [Decision 30/1992 (V. 26.) AB, ABH 1992, 167; Decision 33/1998 (VI. 25.) AB, ABH 1998, 256; Decision 1270/B/1997 AB, ABH 2000, 713; Decision 37/2000 (X. 31.) AB, ABH 2000, 293; Decision 13/2001 (V. 14.) AB, ABH 2001, 177; Decision 57/2001 (XII. 17.) AB, ABH 2001, 484; Decision 50/2003 (XI. 5.) AB, ABH 2003, 566, 576; Decision 18/2004 (V. 25.) AB, ABK May 2004, 393, 396]

The freedom of speech in the Parliament is an essential component of the freedom of expression protected under Article 61 para. (1) of the Constitution. The Parliament is a place of primary importance for the enforcement of the freedom of expression, where the Members of Parliament make decisions on matters directly affecting the future of the country, after asserting arguments and counterarguments in a debate. The publicity of parliamentary debate and the freedom of speech of Members of Parliament are indispensable for constitutional legislation. However, the possibility to apply a wide scale of criminal (administrative infraction) sanctions against a Member of Parliament on the basis of his or her statements made in the parliamentary debate endangers real public debate and the free expression of the legislator's will emerging after debate. The right to immunity is one of the main guarantees of the freedom of speech in the Parliament, as it ensures that Members of Parliament can debate public matters without fearing that their statements made in the Parliament would subsequently be used against them in criminal or civil proceedings. Furthermore, "the State interest in the uninterrupted and uninfluenced performance" [Decision 60/1994 (XII.24.) AB, ABH 1994, 342, 363] of the tasks of Members of Parliament, and in particular its control over

the executive power, justifies the limitation of the liability of Members of Parliament regarding their statements and acts made and done in their capacity as Members of Parliament. Members of Parliament shall carry out their duties in the public interest. [Article 20 para. (2) of the Constitution]. Controlling the executive power is an important task of Members of Parliament, and it is indispensable for the appropriate performance of this task to have access to the necessary information of public interest. This is served, among others, by the right enshrined in Article 27 of the Constitution, according to which a Member of Parliament may address an interpellation or a question to the Government or any of the Members of the Government, as well as to the General Prosecutor, on any matter falling within their respective sphere of authority, and direct a question to the ombudsmen, the President of the State Audit Office and the President of the National Bank of Hungary.

Thus, as emphasised earlier by the Constitutional Court, the free debating of public matters in the Parliament is, "on the one hand, an indispensable precondition for adequate legislation. On the other hand, free parliamentary debate contributes to making it possible for voters to gain an adequate picture about the activities of the Members of Parliament and other important officials under public law, so that they can participate in political discussions and decision-making in possession of proper information." [Decision 50/2003 (XI. 5.) AB, ABH 2003, 566, 576]

2. According to Decision 30/1992 (V. 26.) AB, the protection of the right to human dignity may necessitate the restriction of the freedom of expression (ABH 1992, 167, 174). Since its Decision 8/1990 (IV. 23.) AB, the Constitutional Court has considered the right to human dignity to be one of the phrases used to designate the so-called "general personality right", and the protection of one's privacy and honour is one of the aspects of this general personality right. There are legal tools for protecting one's honour in the civil, criminal and administrative infraction laws as well, and – as pointed out by the Constitutional Court in the CCD – "as human dignity plays a very important role, criminal law can, in general, be considered a final tool in the system of legal liability as a non-excessive form of reaction to conducts that defame the individual's honour". (ABH 1994, 219, 229) However, it was pointed out in the same decision that on the basis of the joint consideration of the protection of honour and good reputation and the free debating of public matters, the freedom of expression may only be restricted to a less extent for the protection of those exercising public authority, and that "in the field of open debates on public affairs and in the relation between

the freedom of expression, as a fundamental constitutional right, and the set measures restricting this right with the general criminal law rules of protecting one's honour or with specific statutory definitions, the tendency experienced in the European democratic countries shows the decreasing significance of criminal law measures and the growing importance of the freedom of expression". [Decision 36/1994 (VI. 24.) AB, ABH 1994, 219, 224]
It was in the interest of protecting honour that the legislator restricted the freedom of Members of Parliament to express political opinion by inserting the challenged text into Section 4 of the AMP. The Constitutional Court continued by examining what acts are not covered – on the basis of the text "to libel and defamation" in the second sentence in Section 4 of the AMP – by the exemption from liability of Members of Parliament, and whether the application of criminal/administrative infraction sanctions can be constitutionally justified in the case of such acts.

The content of the challenged text in Section 4 of the AMP is detailed in Acts belonging to other branches of law: the CC and the AAI. The meaning of the challenged statutory text ("to libel and defamation") can only be determined in consideration of the provisions referred to above (Section 179 and Section 180 of the CC; Section 138 of the AAI). With regard to the constitutional application of the statutory definitions of libel and defamation to the expression of opinions affecting politicians acting in public, Decision 36/1994 (VI. 24.) AB (hereinafter: the CCD) is to be followed. Therefore, in order to determine the content of the exemption from criminal liability of Members of Parliament, it is indispensable to consider the constitutional requirements specified in the holdings of the CCD. Consequently, the Constitutional Court has judged the present matter on the basis of the logic of the constitutional requirements in the CCD.

The CCD (due to the facts of the specific case that formed the basis of the decision) mainly focused on journalists as "perpetrators", and on politicians acting in public as "injured parties". In the present case, Members of Parliament are "perpetrators", and politicians acting in public (who can even be Members of Parliament as the case may be), among others, are "injured parties". Thus, the fact of being on the side of "injured parties" is the common point. The fact that in the present case the perpetrators are Members of Parliament does not mean that that the constitutional requirements of the CCD could not be applied to the criticism of politicians acting in public, because the requirements specified in the holdings of the CCD include statements applicable in a scope broader than the specific case concerned, in order to

ensure the free criticism of public actors and the free debating of public matters. In respect of special injured parties (authorities, official persons, politicians acting in public), the CCD made a distinction between offences performed by uttering value judgements and stating facts, establishing the unpunishable nature of the former ones and specifying only a few cases when the latter ones are punishable.

3.1. According to the constitutional requirement defined in the CCD, an expression of a value judgement capable of offending the honour of an authority, of an official person or of a politician acting in public, and expressed with regard to his or her public capacity is not punishable under the Constitution. (ABH 1994, 219)

This means that no Member of Parliament may be held accountable under criminal law on the ground of a defamatory statement made in his or her capacity as a Member of Parliament (at the session of the Parliament, or at a sitting of a parliamentary committee) if the party injured by the statement is another Member of Parliament or a politician acting in public. It is within the scope of the freedom of speech in the Parliament when a Member of Parliament makes a defamatory statement regarding the mandate or governmental work of a fellow Member of Parliament (or other politician acting in public). As a result of the above constitutional requirement in the CCD – with the exception of defamation by assault – no defamation can be perpetrated on the basis of Section 180 para. (1) item a) of the CC against a Member of Parliament or other politician exercising public authority or otherwise acting in public. This is rooted in the constitutional principle according to which the freedom of expression "requires special protection when it relates to public matters, the exercise of public authority, and the activity of persons with public tasks or in public roles." (ABH 1994, 219, 228) The statutory definition of defamation and that of libel referred to below, both acts being sanctioned by the CC, are to be enforced during the application of the law with the constitutional content established in the CCD and further detailed in the present Decision.

3.2.1. According to the CCD, a statement of facts or a rumour capable of offending the honour of the authority or the persons referred to above or an expression directly referring to such a fact is punishable only 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 expected of him or 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. (ABH 1994, 219)

In line with the first part of the above constitutional requirement, a Member of Parliament may only be held accountable under criminal law for his or her statements of facts related to a fellow Member of Parliament or other person exercising public authority or a politician acting in public in respect of statements the falsity of which was known to him or her. The CCD determined – for the purpose of ensuring the enforcement of the freedom of expressing political opinion guaranteed in Article 61 para. (1) of the Constitution – the constitutional content of Sections 179 and 180 of the CC, and those applying the law must take it into account in the course of judging cases affecting politicians acting in public and related to public matters.

3.2.2. According to the constitutional requirement specified in the CCD, a perpetrator making a defamatory statement of facts against a politician acting in public would be punishable even if it was because of the perpetrator's failure to pay attention or exercise circumspection reasonably expected of him or her that he or she did not know about the falsity of the fact. The Constitutional Court confirms in the present Decision that the constitutional value content of the freedom of expression and the freedom of the press regarding public matters is particularly high, as it is an essential element of Article 61 para. (1) of the Constitution to allow the free debating of public matters and the criticism of public actors. Therefore, the Constitutional Court considers that the constitutional requirement established in the CCD is to be followed in the future in line with the following.

On the basis of the constitutional requirement in the CCD, the statutory definitions of libel and defamation applicable to everybody may only be applied for the protection of persons exercising public authority or politicians acting in public within the narrower limits defined by the Constitutional Court. The criminal offence of libel defined in Section 179 of the CC can only be committed intentionally, and intentionality may be established merely on the ground of the perpetrator knowing that the asserted fact is capable of offending one's honour.

It is stressed by the Constitutional Court that the above constitutional requirement of the CCD does not mean that the legislator must make the CC suitable for making the perpetrator punishable on the basis of a negligent libel committed against a public actor if the perpetrator did not know about the falsity of the fact, capable of offending one's honour, asserted or disseminated by him or her because of his or her failure to pay attention or exercise circumspection expected of him or 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. This would act against the very freedom of expressing political opinion enshrined in Article 61 para. (1) of the Constitution. Consequently, the Constitutional

Court maintains the constitutional requirement established in the CCD in accordance with the arguments expressed here.

3.3. It follows from the constitutional requirement specified in the holdings of the CCD that a Member of Parliament is to be held accountable under criminal and administrative infraction law for committing libel or defamation against a person other than one exercising public authority or a politician acting in public. The protection of the good standing of one's reputation and honour must be respected by Members of Parliament when performing their work and during parliamentary debates; the law must provide protection against assaults by Members of Parliament on the honour of private individuals or politicians acting in public in cases not related to public matters.

As a result, the challenged text in Section 4 of the AMP is not unconstitutional in itself, as it may be necessary to restrict the freedom of expression for the protection of private individuals' right to human dignity, and – with the exceptions specified above – for the protection of the honour of politicians acting in public in cases not affecting public matters. On the basis of the above provision of the AMP, a Member of Parliament may be held accountable in accordance with Article 61 para. (1) of the Constitution and the constitutional requirements specified in the CCD in the case of committing libel or defamation against a person other than a politician acting in public, or making a statement injuring a politician acting in public but not related to public matters, therefore the Constitutional Court has rejected the petition seeking the annulment of the text "to libel and defamation" in Section 4 of the AMP.

4. Article 20 para. (3) of the Constitution grants the right to immunity to Members of Parliament with the content specified in the AMP. However, this may not lead to emptying the content of the right to immunity or to the unconstitutional restriction of the freedom of speech in the Parliament.

"Open discussion of public affairs is a requisite for the existence and development of a democratic society which presupposes the expression of different political views and opinions and the criticism of the operation of public authority." [CCD, ABH 1994, 219, 229] As the primary place of the above discussion is the Parliament, the unnecessary restriction of parliamentary debate in a manner violating fundamental rights would turn the freedom of the operation of the legislative body and the freedom of speech in the Parliament into an illusion.

Although the protection of privacy must also be respected by Members of Parliament in the course of exercising their mandates, when the limits of the right to immunity of Members of

Parliament aimed at the protection of honour – as contained in Section 4 of the AMP – are enforced with a content other than the constitutional content defined in the CCD and the present Decision, they may deter Members of Parliament from disclosing information of public interest and may allow the establishment of their liability in criminal or administrative infraction proceedings for acts protected under Article 61 para. (1) and Article 27 of the Constitution.

Therefore, on the basis of the constitutional requirement established in the CCD for those applying the law, in the present Decision the Constitutional Court has delimited the scope within which the text "to libel and defamation" in Section 4 of the AMP may be constitutionally applied, holding that on the basis of the above text the exemption from liability of Members of Parliament must be extended to the expression of opinion – containing a value judgement related to debating public matters – by Members of Parliament concerning a fellow Member of Parliament, another person exercising public authority, or a politician acting in public. Furthermore, the Constitutional Court has established that it is a constitutional requirement to be followed during the procedure for suspending the right to immunity that, in the case of stating or disseminating a fact capable of offending the honour of a politician acting in public, or using an expression directly referring to such a fact, the right to immunity of the Member of Parliament be only suspendable if the Member of Parliament knew that his or her statement was essentially false.

The Constitutional Court has ordered the publication of this Decision in the Hungarian Official Gazette in view of the importance of the matter.

Budapest, 28 September 2004

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President of the Constitutional Court

Dr. István Bagi
Judge of the Constitutional Court

Dr. Mihály Bihari
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Judge of the Constitutional Court

Dr. István Kukorelli
Judge of the Constitutional Court, Rapporteur

Dr. János Strausz
Judge of the Constitutional Court

Dr. Éva Tersztyánszky-Vasadi
Judge of the Constitutional Court