DECISION 18/2000 (VI. 6.) AB

IN THE NAME OF THE REPUBLIC OF HUNGARY

On the basis of a judicial initiative seeking posterior examination of the unconstitutionality of a statute – with a dissenting opinion by Constitutional Judge dr. János Strausz – the Judge of the Constitutional Court has adopted the following

decision:

The Constitutional Court holds that Section 270 of Act IV of 1978 on the Criminal Code is unconstitutional and, therefore, annuls it as of the date of publication of this Decision.

The Constitutional Court orders that the final judgments rendered in criminal proceedings conducted on the basis of Section 270 of Act IV of 1978 on the Criminal Code be reviewed if the convicted person has not yet been relieved of the unfavourable consequences of his conviction.

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

Reasoning

I

1. The Central District Court of Pest, suspending the proceedings in course, filed a petition with the Constitutional Court regarding criminal case 17.B.VIII. 21900/1995 instituted in the misdemeanour of scare-mongering. In the opinion of the court, Section 270 of Act IV of 1978 on the Criminal Code (hereinafter: the CC) defining and ordering the punishment of scare-mongering violates Article 61 paras (1) and (2) of the Constitution, the freedom of expression, and the freedom of the press.

In its injunction, the court justified its constitutional concern primarily with reference to the provisions of the Constitutional Court decisions on the criminal law restriction of the freedom

of expression [Decision 30/1992 (V.26) AB and Decision 36/1994 (VI.24) AB]. According to the court, the immaterial nature of endangerment of the criminal offence defined in Section 270 of the CC requires a subjective interpretation of the law, which in turn allows an inconsequent and arbitrary jurisdiction. The disposition of the criminal offence does not clearly articulate the reasoning of the text of the Bill in question, warning the judges not to apply the weapon of criminal law against exaggerations and generalisations that cannot be taken seriously.

2. According to the Constitution, everyone has the right to freely express his opinion, and furthermore, to have access to, and distribute information of public interest. The Republic of Hungary recognises and respects the freedom of the press [Article 61 paras (1) and (2)].

The CC contains in Chapter XVI specifying criminal offences against public order, among the offences against public peace, the following provisions on scare-mongering:

"Section 270 (1) Anyone who in front of a large public gathering states, or spreads the rumour of a false fact – or a true fact distorted in such a way – so as to make it capable of disturbing public peace, is to be punished for misdemeanour by imprisonment for up to one year, public labour or a fine.
(2) The punishment of the felony shall be imprisonment for up to three years if the scare-mongering is committed on the location of public danger or at the time of war."

II

When elaborating its position, the Constitutional Court took stock of the historical precedents of the criminal offence and the dogmatic contents thereof.

1. The history of the legal regulation of scare-mongering has basically been a process of widening criminal accountability by expanding and specifying in a more and more general manner the elements of the statutory definition.

Alarm-mongering was first introduced in Section 40 of Act XL of 1879 on the Criminal Code of Misdemeanours (CCM), followed by misdemeanour committed through the press as specified in Section 24 item 7 of Act XIV of 1914 on the Press. Then, in the 1930s, various

Acts of Parliament widened the scope of the protected legal subjects (warfare, order of economic and religious spheres, balance of the national economy, public order and public peace, and foreign policy interests of the country). The process continued in 1946 and 1947 by introducing the criminal law protection of the democratic order of the State and the Republic.

The official compilation of the substantive criminal law in force as published in 1952 and 1957 included the statutory definitions of scare-mongering and alarm-mongering – with the exception of scare-mongering degrading the value of the Forint – within the offences against the People's Republic and, more specifically, among the offences against the internal security of the State. Act V of 1961 on the Criminal Code of the People's Republic of Hungary abolished the political nature of scare-mongering by placing it among the offences against public safety and public order, clearly separating it from the offences against the State. Although, according to the Minister's reasoning to the Bill, the statutory definition found in Section 218 had been created by contracting all former statutory definitions, it only specified public peace and the state of the economy as protected legal subjects.

With a further abstraction, the Criminal Code of 1979 that replaced Act V of 1961 regulated scare-mongering in Chapter XVI containing offences against public order. According to the Minister's reasoning attached to the Bill, "this Chapter regulates the statutory definitions of the criminal offences that, in general, do not violate the rights and interests of specific persons but have a harmful effect on a wider scope of persons, i.e. groups of citizens of various scales. The direction of this harmful effect determines the internal structure of the Chapter. The Titles corresponding to the structure concerned are consequently the following: statutory definitions of criminal offences against public safety, public peace, public trust and public health." Accordingly, in the structure of the CC in force, public peace is an element of public order and the legal subject of certain offences in addition to scare-mongering, such as incitement against an Act of Parliament or against an official resolution (Section 268), incitement against the community (Section 269), defamation of national symbols (Section 269/A), use of symbols of despotism (Section 269/B), menacing with public danger (Section 270/A), rowdyism (Section 271), violation of public decency (Section 272) and taking the law into one's own hands (Section 273).

The link between scare-mongering and political rights is illustrated by the fact that the original statutory definition of the offence defined in Section 270 of the CC that had punished the same conducts as specified by the law in force if committed "in front of others" was modified by Section 16 of Act XXV of 1989 – as a result of the national conciliation negotiations held in 1989 with the purpose of creating, in a consistent way, the guarantees of the State under the rule of law – in the form of limiting criminal liability to conducts committed "in front of a large public gathering".

2. The legal subject of scare-mongering is public peace based on factual information and being free of disturbing and false rumours. The objective supply of information shall not constitute an offence even if it causes disorder in public peace. In general, the dissemination of negative statements of facts – "alarming news" by the old terminology – can disturb public peace. However, it was pointed out as early as in the 1930s that even the statement or the dissemination of positive facts, i.e. false "good news" can constitute the offence, as the statement or the dissemination of positive facts can generate discontent in the public when the falseness of such facts is revealed.

The conduct constituting the offence specified in Section 270 of the CC is the statement, or spreading the rumour of false facts, or the distortion of true facts. The precondition for constituting such an offence is committing it in front of a large public gathering, the content of which is partly elaborated in the judicial practice and partly defined by the Criminal Code. According to the judicial practice, the existence of a large public gathering may be established if there are a great number of people present when the offence is committed, or there is the real possibility of a great number of people or an undeterminable number of people acquiring knowledge of the offence. The number of people present is considered great if the exact number cannot be determined at a single glance. According to the interpreting provision of the CC, in force as of 1 March 2000, it qualifies as a „large public gathering if the offence is committed through communication in the press or other mass media, by reproduction, or by communicating electronically recorded information via a telecommunication network" [Section 137 item 12 of the CC as provided for in Section 6 para. (2) of Act CXX of 1999].

Scare-mongering is an offence of endangerment, so it is realised without actually disturbing public peace if the communication of false or distorted facts is capable of causing such an effect. The criteria of capability have also been elaborated in the judicial practice.

As far as the constitutional review is concerned, it is important that in case of scare-mongering the form of guiltiness is intentionality. The offence may only be committed intentionally: the perpetrator has to be conscious of the communicated fact being false or distorted as well as of the circumstances that the communication of such facts is suitable for disturbing public peace and that the conduct is performed in front of a large public gathering. Scare-mongering, however, is not an offence committed intentionally, with the perpetrator's actual intent (blacking a political opponent, raising negative emotions against neighbouring countries, damaging the business competitors on the market, raising the circulation of a newspaper) being indifferent in terms of criminal liability. The perpetrator's actual motivations (revenge, anger, hatred, sensationalism, exhibitionism, desire for political success) are also indifferent in criminal law, as motivation does not constitute an element of the statutory definition. Criminal liability may be established if the perpetrator realises and accepts – even if does not desire – that the communication of the facts known by him to be false or distorted can disturb public peace (Section 13 of the CC).

The criminal offence is to be punished more severely if the communication of false or distorted facts suitable for disturbing public peace is performed at the time of war or danger seriously threatening the security of the State (Section 137 item 10 of the CC) or on the location of public danger (a concept elaborated in the legal literature and by the judicial practice).

III

The petition is well founded. Section 270 para. (1) of the CC is unconstitutional as it restricts the freedom of expression and the freedom of the press guaranteed in Article 61 paras (1) and (2) of the Constitution to an unnecessary and disproportionate degree, and it violates the constitutional requirements deductible from the provisions of Article 2 para. (1) and Article 8 paras (1) and (2) of the Constitution.

1. According to the principle of the legality of criminal law as consequently enforced in the practice of the Constitutional Court, the declaration of the criminality of an act and the threat of punishment must be based on constitutional reasons: they must be necessary, proportional

and used as the last resort [Decision 11/1992 (III. 5.) AB, ABH 1992, 77, 87]. The Constitutional Court presented its opinion in several decisions on the constitutional conditions of restricting the freedom of expression by measures of criminal law, and basically in Decision 30/1992 (V. 26.) AB (ABH 1992, 167 – hereinafter: CCDec. 1) on the constitutionality of incitement against the community, and summarised in Decision 36/1994 (VI. 24.) AB (ABH 1994, 219 – hereinafter: CCDec. 2) on the constitutionality of punishability of the defamation of authorities and official persons. By consequently enforcing the principles set forth in the above two decisions, the Constitutional Court established the unconstitutionality of, and annulled by Decision 12/1999 (V.26) AB (ABH 1999, 106 – hereinafter: CCDec. 3) the amendment made in 1996 to the statutory definition of incitement against the community. The Constitutional Court formed an opinion on the restriction by the measures of criminal law of the same fundamental right when rejecting the petitions challenging the punishment of the defamation of national symbols in Decision 13/2000 (V. 12.) AB (Official Gazette 46/2000, p. 2748) and the use of symbols of despotism in Decision 14/2000 (V. 12.) AB (Official Gazette 46/2000, p. 2758).

2. In the present case, the Constitutional Court has decided, first of all, whether the conducts specified as scare-mongering – taking into account the dogmatic contents of Section 270 of the CC as well as the elaborated judicial practice – fall into the constitutionally protected scope of the freedom of expression, that is to say, whether the punishment of such conducts represents a restriction on the constitutional fundamental right to the freedom of expression.

The Constitutional Court holds it important to point out in this case, too, that the right to the freedom expression protects the expression of opinion irrespective of the value or veracity of its content. The freedom of expression has only external boundaries: until and unless it clashes with such a constitutionally drawn external boundary, the opportunity and fact of the expression of opinion is protected, irrespective of its content. In other words, it is the expression of an individual opinion, the manifestation of public opinion formed by its own rules and, in correlation to the aforesaid, the opportunity of forming an individual opinion built upon as broad information as possible what is protected by the Constitution. The Constitution guarantees free communication – both as an individual behaviour and as a social process. Every opinion, good and damaging, pleasant and offensive, has a place in this social process, especially because the classification of opinions is also the product of this process

(CCDec. 1, ABH 1992, 167, 179; CCDec. 2, ABH 1994, 219, 223; CCDec. 3, ABH 1999, 106, 111).

The relation between the freedom of opinion and the statement of false facts was analysed by the Constitutional Court in CCDec. 2. Accordingly, "The Constitution, in the wording of the freedom of expression, does not explicitly differentiate between a statement of facts and a value judgement. It is the basic objective of the freedom of expression to allow a chance for the individual to form others' opinions and convince others about his/her own opinion. Therefore, in general, the freedom of expression includes the freedom of all kinds of communication independently from the way or the value, moral quality and, in most cases, the content of truth of the communication concerned. Even the communication of a fact alone may be considered an opinion, since the circumstances of the communication itself may reflect an opinion, and thus the constitutional fundamental right to the freedom of expression is not limited to value judgements. Nevertheless, it is well justified to distinguish between value judgements and statements of facts when setting bounds to the freedom of expression.

Value judgement, i.e. somebody's personal opinion is always covered by the freedom of expression, regardless of its value, truth and emotional or rational basis. But human dignity, honour and reputation, likewise constitutionally protected, can constitute the outer limit of the freedom of expression realized in value judgements. The realization of criminal law responsibility in the protection of human dignity, honour and reputation cannot be considered – in general – to be disproportionate, and thus unconstitutional" (ABH 1994, 219, 230).

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

responsibility and in the interest of avoiding the communication of false facts, it involves certain liabilities for those shaping public opinion by profession" (ABH 1994, 219, 231).

In the present case, the Constitutional Court has established that the above quoted delimitation of the boundaries to the freedom of expression is to be followed in the case of a collision between the constitutional fundamental rights at the top of the hierarchy of values set up in the practice of the Court. Excluding the intentional communication of false facts from the scope of the freedom of expression applies to comparing the constitutional protection of human dignity, honour and the good standing of reputation with the constitutional right to the freedom of expression.

In the opinion of the Constitutional Court, the freedom of expression would have a very limited value if it covered the right to the statement of true facts only. The criminal law borders of the constitutionally protected freedom of expression are not necessarily the same if they are compared not to the right to human dignity – a "mother right" [Decision 8/1990 (IV. 23.) AB, ABH 1990, 42] defined in the practice of the Constitutional Court as a constitutionally protected general personality right – but to other fundamental rights or constitutional values. The essential contents of the fundamental right that may not be restricted even in an Act of Parliament [Article 8 para. (2)] is not considered to be given once and for all; the unrestrictable essential content is a relative concept and its scope depends on the constitutionally necessary and proportionate level of restriction. It must be assessed within the discretion of the Constitutional Court.

The constitutional value content of public peace is related to the normative content of the State under the rule of law defined in Article 2 para. (1) of the Constitution; as an important precondition for the existence of a democratic State under the rule of law, it represents well ordered relations of living together in the society and in internal politics. Public peace is a constitutional value covered by the State obligation of protection and, therefore, the use of criminal law measures of protection may, in general, be deemed neither unnecessary nor disproportionate.

Therefore, it is a basic question of reviewing the constitutionality of scare-mongering where to draw the line delimiting the borders of protecting by criminal law measures the freedom of opinion (expression and communication) acknowledged by the Constitution as a fundamental

right, and valued and protected in the practice of the Constitutional Court as a prominent mother right of communication when compared to public peace as a constitutional right that may even be protected by measures of criminal law. As explained in Decision 14/2000 (V. 12.) AB by the Constitutional Court, disrupting public peace to a certain degree may justify the restriction of the right to the freedom of expression. In such cases, public peace may be subject to criminal law protection. "The scope of protection is another issue, as it may only be decided on a case-by-case basis what level of disrupting public peace may constitutionally justify a restriction on the freedom of expression" (Official Gazette 46/2000, p. 2758, 2763).

3. According to the permanent practice of the Constitutional Court, the State may only use the tool of restricting a fundamental right if it is the only way to secure the protection or the enforcement of another fundamental right or liberty or to protect another constitutional value. Therefore, it is not enough for the constitutionality of restricting a fundamental right to refer to the protection of another fundamental right, or the enforcement or protection of a constitutional value, 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 contents of a right without a forcing cause or pressing public interest is unconstitutional, just as doing so by using a restriction of a weight disproportionate to the purported objective [CCDec. 1., ABH 1992, 167, 171; Decision 56/1994 (XI. 10.) AB, ABH 1994, 312, 313].

In assessing the constitutionality of scare-mongering, the Constitutional Court applied the same test of "necessity" as used in the case of incitement against the community (CCDec. 1, ABH 1992, 164, 172; CCDec. 3, ABH 1999, 112), and in the case of defamation of authorities or official persons (CCDec. 2, ABH 1994, 219, 228).

The Constitutional Court referred in many of its decisions to Decision 21/1996 (V. 17.) establishing that although the definition of crimes is the competency of legislation and thus the sphere where democratic majority opinion is realised, in exceptional cases constitutional review may be applied here as well [ABH 1996, 74, 82; Decision 58/1997 (XI. 5.) AB, ABH 1997, 348, 352; CCDec. 3, ABH 1999, 106, 111; Decision 13/2000 (V. 12.) AB, Official Gazette, 46/2000, p. 2748, 2752]. The criteria of constitutional control over defining a conduct as a criminal offence were set in CCDec. 1.

CCDec. 1 pointed out the following: “Criminal law is the *ultima ratio* in the system of legal responsibility. Its social function is to serve as the sanctioning cornerstone of the overall legal system. The role and function of criminal sanctions, i.e. punishment, is the preservation of legal and moral norms when no other legal sanction can be of assistance.

It is a requirement of contents following from constitutional criminal law that the legislature may not act arbitrarily when defining the scope of conducts to be punished. A strict standard is to be applied in assessing the necessity of ordering the punishment of a specific conduct: with the purpose of protecting various life situations as well as moral and legal norms, the tools of criminal law necessarily restricting human rights and liberties may only be used if it is unavoidable, proportionate and there is no other way to protect the objectives and values of the State, the society and the economy that can be traced back to the Constitution” (ABH 1992, 167, 176).

In the present matter, the Constitutional Court has, accordingly, examined whether it was unavoidably necessary to restrict the freedom of expression and the freedom of the press in case of conducts qualified as scare-mongering, furthermore, if the restriction was in line with the requirement of proportionality, that is to say, if criminal law measures in general and the specific statutory definition of criminal law in particular were necessary and adequate to achieve the desired goal. The answer of the Constitutional Court to the above questions was negative based on its own former practice, the German and French regulations dominating the continental legal systems as well as the principles established in the practice of the European Court of Human Rights.

3.1. Assessing the necessity and the proportionality of punishing a certain conduct by measures of criminal law should cover international comparison as well. It is focused on examining whether the specific interest or value of the community is protected to the same degree in the democratic European legal culture.

Looking over the regulations in force in Germany and France, one may conclude that in the case of statutory definitions most closely corresponding to scare-mongering, the scope of criminal accountability is much narrower and more specific, and although the conducts

constituting the offence are similar, the protected legal subjects are defined more accurately and more clearly.

According to the German criminal code, it is a punishable act under the title „Störpropaganda gegen die Bundeswehr" if someone states in order to disseminate, or disseminates false facts or distorted true facts for the purpose of preventing the army from performing its tasks of defence (StGB § 109 d). Section 126 of the StGB orders the punishment of those who – under the offence entitled „Endangering public peace by threatening with committing a criminal act" (Störung des öffentlichen Friedens durch Androhung von Straftaten) – threaten with committing the criminal offences listed item-by-item in paragraph (1) (manslaughter, causing physical injury, offences against personal freedom, robbery, extortion, offences against public safety etc.). According to paragraph (2), the same qualification applies to the conduct of a person who states, in such a manner that may endanger public peace, that an unlawful act specified in paragraph (1) is being prepared – although the perpetrator knows this to be false.

The French criminal law punishes with imprisonment and a fine those who consciously disseminate in public, by any means, false facts or statements which are capable of staggering the trust in the constancy of the currency, the value of State funds, as well as the public funds of counties, local governments and public institutions. The same punishment applies to those who induce the public to retrieve money from the state's funds or from institutions that are obliged by the law to perform their payments through state funds (Loi du 18 août 1936, Art. 1 and 2). In addition, it is punishable to communicate or disseminate false information with the purpose of making others believe that an impairment endangering persons was or is to be committed. The same punishment applies to those who publish or disseminate false statements making others believe that a natural disaster has happened and it results in unnecessary rescue interventions (Nouveau Code Pénal, Art. 322-14).

3.2. The State of Hungary is obliged to guarantee the freedom of expression by international treaties such as the International Covenant on Civil and Political Rights promulgated in Law-Decree 8 of 1976 and the European Convention for the Protection of Human Rights and Fundamental Freedoms promulgated in Act XXXI of 1993 (hereinafter: the European Convention on Human Rights), specifying the criteria of contents applicable to restricting the freedom of expression. The Covenant expressly specifies the value of public order (Article 19), and Article 10 of the European Convention on Human Rights mentions conditions,

restrictions and sanctions necessary in a democratic society, among others, in order to protect “public order" and to prevent “disorder”.

According to Article 10 point 2, “The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

It has been repeatedly pointed out in the decisions of the European Court of Human Rights that the freedom of expression is one of the fundamental achievements of democratic societies and it should be applied not only to the information and ideas accepted positively, or deemed to be harmless or neutral, but also to the ones that attack, shock or annoy people. Exceptions from the freedom of expression must be interpreted in a strict sense, and the relevant restrictions must be convincingly well founded (cp. Eur. Court H.R. Thorgeir Thorgeirson v. Iceland judgment of 25 June 1992, Series A, no. 239; Eur. Court H.R. Observer and Guardian v. United Kingdom judgment of 26 November 1991, Series A, no. 216; Eur. Court H.R. Rekvényi v. Hungary judgment of 20 May 1999 – Court Reports 99/12, 955.; Bladet Tromso and Stensaas v. Norway judgment of 20 May 1999, par. 58). The European Court of Human Rights acknowledged in one of its latest judgements in the protection of the freedom of expression that the freedom of communication – especially in the case of journalists, on the basis of the key role played by the press in a democratic society – includes the application of overstatements of a certain degree, or even of provocative methods (Eur. Court H.R. Dalban v. Romania judgment of 28 September 1999, par. 49).

According to the practice of the European Court of Human Rights, three conditions have to be fulfilled jointly to allow the restriction of the freedom of expression.

Firstly, the restrictions “must be regulated on a statutory level”. In the judicial practice of the Court, it means, first of all, the quality of regulation rather than a certain level in the hierarchy of norms: all restrictive provisions must comply with the requirement of exact definition. All restrictive provisions must be defined exactly enough to allow the citizens to foresee – with

legal aid if needed – to the extent reasonably justified by the circumstances what consequences their conducts may entail, in order to be able to behave in line with the statutory provisions. If the statutory basis seems to be inadequate in terms of exactness and clarity, the restriction is not in line with the "statutory" level of regulation specified in Article 10 of the Convention.

Secondly, all restrictions must be aimed at a certain statutory purpose. Restrictive provisions may only be applied with the purpose they were created for. According to the case law, it seems that the list of exemptions cannot be extended. At the same time, it is not clear whether the concepts of public safety and disorder cover the concept of public tranquillity. In the case Rekvényi v. Hungary, the Court accepted the protection of national security and public safety as statutory goals for the restriction of the freedom of expression, as well as the prevention of "commotion" – as coined in the Hungarian translation published – (Rekvényi judgement, CR 99/12, 955 – the English version of the text corresponds to the terminology of the Convention, using the term "disorder").

Thirdly, it is clear from the case law of the Court that the criterion of "necessary measures in a democratic society" is the final and decisive aspect of evaluation. There must be an urgent or pressing social need or demand to justify any restriction of the freedom of expression. The existence of the above is verified by the Court by evaluating the proportionality and the adequacy of the sanction (cp. Rekvényi judgement - CR 99/12, 955).

At the same time, the case law of the Court shows that the national authorities have a wide range of options to introduce measures restricting the freedom of expression in order to protect "public safety" and prevent "disorder". This approach is based on the opinion of the bodies in Strasbourg that the national authorities are in a better position than they are to interpret the definition of offences against public safety and to decide whether or not the restrictions serving the purpose of preventing crimes are deemed necessary measures.

3.3. Although the concepts of public order, public safety and public peace are not defined in the CC, it uses them as special legal categories – as illustrated in the structure of the criminal offences found in the Special Part of the CC. By declaring the conducts specified in Section 270 of the CC to be criminal offences, the social interest primarily desired to be protected by the legislature is public peace as an element of public order.

The Constitutional Court examined in CCDec. 1 the possibilities of restricting the freedom of expression for the protection of public peace when it presented its opinion on the constitutionality of incitement against the community as defined in Section 269 of the CC in force at that time. It reads as follows: “The laws restricting the freedom of expression are to be assigned a greater weight if they directly serve the realisation or protection of another individual fundamental right, a lesser weight if they protect such rights only indirectly through the mediation of an institution, and the least weight if they merely serve some abstract value as an end in itself (public peace, for instance)” (CCDec. 1, ABH 1992, 167, 178).

The Constitutional Court acknowledged the constitutionality of restricting the freedom of expression in the case of “incitement to hatred” the legal subject of which is also public peace – as follows from its location in the structure of the CC – protected by declaring the punishability of the conduct in question. In the opinion of the Constitutional Court, the disturbance of public peace also involves the danger of a large-scale violation of individual rights: the emotions whipped-up against the group concerned threaten the honour, dignity (and, in more extreme cases, the lives) of the individuals comprising the group, and by intimidation restricts them in the exercise of their other rights as well (including the right to the freedom of expression). Incitement to hatred involves a danger to individual rights as well which gives such a weight to public peace that the restriction on the freedom of expression may be regarded as necessary and proportionate. Although the actual outcome of the examination is the same, this reasoning considered not only the intensity of the disruption of public peace which – above and beyond a certain threshold (“clear and present danger”) – justifies the restriction on the right to the freedom of expression. What is of crucial importance here is the value that has become threatened: incitement endangers individual rights also accorded prominent places in the constitutional value system.

As far as “mudslinging” is concerned – punishable at that time and subsequently annulled as unconstitutional – the Constitutional Court had a basic objection on the grounds that this immaterial statutory definition of the criminal offence amounts to an abstract protection of public order and peace as an end in itself. The criminal offence was deemed to have been committed even if under the given circumstances, the utterance of the offending statement did not result in even the threat of violating an individual right. According to the assessment of

the Constitutional Court, the abstract endangerment of public peace linked to hypothetic elements of the statutory definition (capability) without a feedback (whether public peace has, indeed, been disturbed), and the presumption of injury did not adequately justify a criminal law restriction on the freedom of expression (CCDec. 1, ABH 1992, 167, 179, 180).

The Constitutional Court also pointed out that public peace itself is not independent from the condition of the freedom of expression. Where one may encounter many different opinions, public opinion becomes tolerant, just as in a closed society an unusual voice may instigate a much greater disruption of public peace. In addition, the unnecessary and disproportionate restriction of the freedom of expression reduces the openness of a society (CCDec. 1, ABH 1992, 167, 180).

4. The Constitutional Court reached the same result when reviewing the constitutionality of scare-mongering specified in Section 270 of the CC. Declaring that the conducts specified in the Act are criminal offences is an unconstitutional restriction on the freedom of expression.

Since the freedom of expression – as a fundamental constitutional right – represents a high level of values, any injury of interest justifying the restriction must be of an extraordinary weight. Therefore, the Constitutional Court had to assess whether the endangerment of public peace by stating, or spreading the rumour of consciously false or consciously distorted facts may be regarded as an injury of such a weight that its prevention or punishment by means of criminal law is a pressing public need. A criminal law restriction on the freedom of expression may be justified by nothing but such a need.

In assessing the above, the Constitutional Court presumed that the value to be protected was the public peace of a democratic State under the rule of law and of an open information society. The scale of public openness exceeding all former levels is a significant phenomenon of the present era of social and political development. This openness is influenced by the constantly developing technologies of telecommunications, the mass media and multi-communications, with tools and methods one could not foresee, as well as the potentials and practically applied forms of communication, getting informed and manipulation.

It may, at the first glance, justify the strengthening of the tools of protection against false information. The swift growth in the demand for information and in actual information, the

results of mass communication technology, the extraordinary role played by the institutions and the tools of mass media in the political, social, cultural and economic spheres together with the phenomenon of the information boom enhance the possibility of the potential danger that may be caused by the conducts to be punished as scare-mongering. At the same time, however, the highly developed information environment, the proliferation and the everyday use of the electronic world-wide web, the possibility to express one's opinion in an electronic form, as well as the rapid acceleration of the flow of information between the State and its citizens not only facilitate the volume and the speed of disseminating false statements and rumours, but they offer equal chances for refuting such rumours and successfully communicating and proving true facts. If the information environment operates the way it is expected in a democratic society, it is a very effective tool to prevent the disturbance of public peace and to rapidly restore the public peace disturbed by misleading or incomplete statements, or by artificially induced panic.

In a democratic State under the rule of law, the freedom of expression and the freedom of the press are essential elements of real democracy and of the democratic way of life, and therefore, it is a basic obligation of the State not to restrict such freedoms even if there is historical and everyday experience of misusing the "freedoms that carry duties and responsibilities" (Article 10 point 2 of the European Convention of Human Rights). Nevertheless, historical and everyday experience also proves that unjustified restriction on the freedom of expression and communication in the form of an over-dimensioned threat, repression and suppression against the danger of misuse results in negative effects in the life of the society and the mind of the people that are difficult to recondition.

Assessing all the above arguments, the Constitutional Court has concluded that stating, or spreading the rumour of false facts, or the distortion of true facts, even if the person stating such facts is conscious of the negative effects of his act concerning public peace and he is content of, or even wishes such effects, are within the limits of the freedom of expression not restrictable by the means of criminal law. In the opinion of the Constitutional Court, as explained above, public peace is a constitutional value to be deducted from the principle of the democratic State under the rule of law. However, taking into account the present communication possibilities of the society, it does not consider the protection of public peace against the conducts covered by the statutory definition of scare-mongering to be such a

pressing social need or a pressing public interest that would demand the application of criminal law measures necessarily restricting constitutional fundamental rights.

Specifying scare-mongering as a criminal offence is an unnecessary and disproportionate restriction on the freedom of expression for the purpose of protecting public peace. It is not the purpose of criminal law to protect constitutional values comprehensively; it should only protect such values against violations of an excess weight. The role of criminal law measures as an *ultima ratio* undoubtedly means that they must be applied in case the tools of other branches of the law prove insufficient. At the same time, in assessing the above, the Constitutional Court takes into account not only the actual state of the legal system but the potentials of its development as well. The incompleteness of the legal instruments available is not an acceptable argument in itself to declare a certain conduct as a criminal offence; the criminal law restriction of constitutional fundamental rights is made neither necessary, nor proportionate on such grounds.

Therefore, the Constitutional Court has established that by ordering the punishment of scare-mongering, the freedom of expression and the freedom of the press guaranteed in Article 61 paras (1) and (2) of the Constitution have been restricted by the legislature in an unnecessary and disproportionate way, violating the provisions of the Article 8 paras (1) and (2) of the Constitution. Consequently, the Constitutional Court has annulled Section 270 of the CC.

At the same time, the Constitutional Court has established that it is not excluded by the Constitution to use the measures of criminal law against scare-mongering in order to protect public peace in certain cases. It follows from Article 8 para. (4) of the Constitution that the freedom of expression may be suspended or restricted in a state of emergency, exigency or peril.

The Constitutional Court has not established the unconstitutionality of Section 270 para. (2) of the CC. There are no constitutional concerns about the legislature ordering to punish the statement of consciously false facts in front of a large public gathering (or the distortion of true facts) if it is committed in a state of emergency e.g. on the location of public danger or at the time of war, and it results in disturbing public peace. However, taking into account the facts that the elements of the statutory definition of the offence itself, i.e. scare-mongering are provided for in Section 270 para. (1) of the CC, and paragraph (2) merely uses the term

"scare-mongering", the Constitutional Court – due to the form of codification used in the Section concerned – could not dispense with the annulment of Section 270 para. (2) of the CC.

5. In addition, the Constitutional Court has established that the wording of the statutory definition does not comply with the formal requirements of constitutional criminal law.

The formal criteria of constitutional criminal law are closely related to the requirement of legal certainty deducted from the principle of the State under the rule of law specified in a normative form in Article 2 para. (1) of the Constitution [cp. Decision 11/1992 (III. 5.) AB – ABH 1992, 77, 84, 91-92]. The formal requirements of the constitutionality of criminal law were first summed up in CCDec. 1 in the following way: "Constitutional criminal law requires the disposition describing the prohibited conduct by threatening with a sanction in criminal law to be straightforward, well-defined and clear. It is a constitutional requirement to clearly express the intentions of the legislature concerning the protected legal subject and the conduct constituting the offence. It must contain a definite message on when the individual is considered to commit a breach of the law sanctioned in criminal law. At the same time, it must not give way to arbitrary interpretation of the law by the jurisdiction. Therefore, it must be examined whether or not the statutory definition delimits the scope of punishable conducts too broadly and whether it is definitive enough" (ABH 1992, 167, 176).

The elements of the disposition of scare-mongering (fact, statement of facts, statement of true and false facts, distortion of true facts, differentiation between the statement of facts and the spreading of rumour etc.) have already been elaborated for almost a century in both the judicial practice and the legal literature covering the scientific theories of criminal law and in legal textbooks as well, taking into account the elements of the statutory definitions ordering the punishment of other, partly identical or similar conducts constituting offences (e.g. libel) as well as the historical precedents of scare-mongering. The legal practice is consequent and unified also in judging what a "large public gathering" shall mean.

The incertitude which raises concerns in terms of legal certainty is connected to assessing the capability of disturbing public peace. Public peace itself is a vague social phenomenon that requires interpretation. Moreover, the assessment of whether a certain statement of facts or spreading of rumour is, in fact, suitable for disturbing public peace is an express possibility

for a casual – and, in a given case, arbitrary – interpretation of the law and jurisdiction. In principle, criminal liability may only be established on the grounds of a real danger of disturbing public peace, but in the concrete individual cases it must be assessed by the authorities in the criminal procedure and, finally, by the penal court as a result of comparing the contents of the statement of facts, the perpetrator's personality, and the circumstances of committing the offence. Undoubtedly, according to the judicial practice, the statement of facts must be a serious one of public significance and of public interest for the society, related to various events or measures in the spheres of the State, society, the economy, politics etc. - in other terms, one that is objectively suitable for causing disturbance or distraction in the public as it spreads.

Assessing Section 270 of the CC in respect of the definiteness, accuracy, and clarity required for the statutory definitions of criminal law, one may conclude that in evaluating criminal liability, the courts have to take into account of a constitutionally unacceptable number of criteria defined not in an Act of Parliament, but in the reasoning of the Bill, the case law and legal literature. All this allows such a broad room for judicial errors, as some aspects might be left out of consideration despite the most careful evaluation, as well as for arbitrary selection (as to what is, and what is not taken into account) that amounts to the level of legal uncertainty.

At the same time, it is pointed out by the Constitutional Court that the present decision should not be interpreted in such a way as preventing the legislature from punishing as criminal offences conducts falling under immaterial statutory definitions of endangerment. It does not follow from the provisions of the Constitution that criminal law – due to its role as an *ultima ratio* – may only react to damage already done, and that in the statutory definitions of endangerment the measures of criminal law are unnecessary and disproportionate.

6. Ordering the review of final judgments rendered in criminal proceedings is based upon Section 43 para. (3) of Act XXXII of 1989 on the Constitutional Court; the publication in the Official Gazette is based upon Section 41 of the same Act.

Budapest, 5 June 2000

Dr. János Németh

President of the Constitutional Court

Dr. István Bagi Judge of the Constitutional Court	Dr. Mihály Bihari Judge of the Constitutional Court
Dr. Ottó Czúcz Judge of the Constitutional Court	Dr. Árpád Erdei presenting Judge of the Constitutional Court
Dr. Attila Harmathy Judge of the Constitutional Court	Dr. András Holló Judge of the Constitutional Court
Dr. László Kiss Judge of the Constitutional Court	Dr. István Kukorelli Judge of the Constitutional Court
Dr. János Strausz Judge of the Constitutional Court	Dr. Éva Tersztyánszky-Vasadi Judge of the Constitutional Court

Dissenting opinion by Dr. János Strausz, Judge of the Constitutional Court

I hereby file a dissenting opinion with the following reasons:

The conducts the punishment of which is ordered by the legislature in Section 270 of the CC are outside of the scope of the constitutional fundamental right to the freedom of expression, and they are not related to the freedom of the press. The subject of the freedom of expression and the freedom of the press is not identical with the conduct punished under scare-mongering. It is clear in the latter case that the statement, or spreading the rumour of untrue facts or distorted true facts are to be punished if they are capable of disturbing public peace.
The penal rule in question is not aimed at repressing the freedom of expression, the freedom of criticism, value judgements or the free communication of ideas, and it is not even able to do so.

The freedom of expression and the freedom of the press as fundamental rights do not encompass the freedom of stating and disseminating consciously false, distorted, twisted or manipulated information; moreover, such statements may deflate and even put out such rights. Historical facts prove the damaging effects of consciously mendacious propaganda, the causing of political and social scandals, and of the degradation of the press, used simply as a tool.
Presently, the press and the electronic media have such a reputation that the public opinion tends to accept the truth of communicated information without proper background knowledge

and due criticism. Therefore, there is a considerable interest in the truthfulness of such public communication, statements and information.
The freedom of expression and the freedom of the press are not unlimited; such liberties only extend to the limits of not violating or endangering the rights of others or of the legal system. It is not censorship to set and regulate, with due guarantees, the limits of the freedom of the press by means of the law.

The essential content of the freedom of the press covers the right of the press, the radio and the television to freely communicate and publish news, reports, information, ideas, criticism, literature and other works of art as well as political and other opinions without any restriction on political, religious, ideological or other grounds – including interference by the State.
As far as the communication of facts is concerned, it is an important element of content that the facts must be true and the communication must be trustworthy. On the other hand, stating false facts, distorting true facts, and misleading or manipulating the public opinion is out of the scope of the freedom of the press, it cannot be regarded as an essential content of this right, and therefore, it is acceptable to apply legal restrictions and sanctions in this respect.

Article 2 para. (1) of the Constitution states the principle that the Republic of Hungary is a state under the rule of law. The principle of being a state under the rule of law naturally encompasses the obligation and the right of the state to maintain and protect the rule of law, legal certainty as well as public order and public safety connected to the above. This way, the state protects the citizens' fundamental rights by guaranteeing the exercise thereof. Public peace – as part and an element of public order – is, at the same time, part of legal certainty and the rule of law in a broad sense.

As a consequence, it follows form the clause of the Constitution on the principle of the state under the rule of law that guaranteeing public peace by criminal law measures is not unconstitutional, nor is Section 270 of the CC ordering the punishment of scare-mongering. Public peace is a legal subject protected by the Constitution, and therefore, the petition should have been rejected.

Budapest, 5 June 2000

Dr. János Strausz
Judge of the Constitutional Court

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