Decision 7/2014 (III. 7.) AB

On the basis of a petition seeking an ex post review of conformity of a legal provision with the Fundamental Law, with Justices *dr. István Balsai, dr. Egon Dienes-Oehm, dr. Imre Juhász, dr. Barnabás Lenkovics, dr. Béla Pokol, dr. László Salamon* and *dr. Mária Szívós* dissenting, sitting as the full court, the Constitutional Court rendered the following

decision:

The Constitutional Court holds that the normative text "on a legitimate ground of public interest" in Section 2:44 of Act V of 2013 on the Civil Code is in conflict with the Fundamental Law; therefore, the Constitutional Court annuls said provision. The annulled normative text shall not take effect.

In line with the annulment, Section 2:44 of Act V of 2013 on the Civil Code shall enter into force with the following text:

"Section 2:44 [Protection of the personality rights of politically exposed persons]

The exercise of the fundamental rights relating to the free debate of public affairs may diminish the protection of the personality rights of politically exposed persons to the extent necessary and proportionate, without prejudice to human dignity."

The Constitutional Court shall publish this Decision in the Hungarian Official Gazette.

Reasoning

I

[1] The Commissioner for Fundamental Rights petitioned the Constitutional Court seeking a posterior norm control review of Section 2:44 of Act V of 2013 on the Civil Code (hereinafter referred to as the "new Civil Code") taking effect on 15 March 2014. In the Commissioner's opinion formed on the basis of reviewing the studies on the codification of the new Civil Code as well as the Hungarian and the European practice of fundamental rights, there are serious justifiable constitutional concerns regarding the impugned regulation on openness to criticism of politically exposed persons. As pointed out by the petitioner, under the standard specified in the new Civil Code,

politically exposed persons can only be made subject to heavy criticism in the interest of enforcing the fundamental rights guaranteeing the debate of public affairs, in particular, freedom of opinion and freedom of the press with the fulfilment of three cumulative conditions: (1) if the criticism does not prejudice the human dignity of the person concerned, (2) if its extent is necessary and proportionate, and (3) if the existence of "a legitimate ground of public interest" can be verified. The Commissioner for Fundamental Rights maintains that one of the conditions, the requirement of having "a legitimate ground of public interest" raises constitutional concerns related to fundamental rights that justify the initiating of a review in a preventive manner by the Constitutional Court before the Act takes effect and prior to the establishment of judicial practice. The existence of "a legitimate ground of public interest" as a condition of allowing the criticising of politically exposed persons to a wider extent than other persons would pose a disproportionate restriction on freedom of speech and freedom of the press; furthermore, it would not properly guarantee debate over public affairs or criticism of the operation of public power.

[2] The petition raised the point of Article IX (1) and (2) of the Fundamental Law pursuant to which everyone shall have the right to freedom of speech and Hungary shall recognise and protect freedom and diversity of the press, and shall ensure the conditions for the free dissemination of information necessary for the formation of democratic public opinion. In line with Article IX (4) incorporated with the fourth amendment to the Fundamental Law, the right to freedom of speech may not be exercised with the aim of violating the human dignity of others. The Commissioner for Fundamental Rights considers that the changes in the provisions of the Fundamental Law in the field of freedom of speech and that of the press do not imply disregarding the Constitutional Court's case law, based also on the practice of the European Court of Human Rights, related to the possibility of criticising politically exposed persons and the protection of their personality rights. On the contrary, previous findings of the Constitutional Court shall remain valid. In the practice of the Constitutional Court, a fundamental and clear requirement is that freedom of the press and opinion enjoys special protection; however, it is not unlimited: It must not entail a disproportionate violation of the right to human dignity of others, in this case public figures. However, the petition refers to the Constitutional Court's consistent practice of requiring special protection for freedom of the press and freedom of speech where they concern public affairs, the exercise of public authority or the activities of persons performing public duties or performance of a public function; therefore, with regard to persons exercising public authority and politicians acting as public figures the constitutionally protected scope of freedom of speech is broader than in the case of other persons.

[3] The Commissioner for Fundamental Rights maintains that, in addition to the priority protection of freedom of expression and the press, the violation of human dignity

constitutes a constitutional limit in the criticism of public figures [Article II and Article IX (4) of the Fundamental Law] and compliance with the necessary and proportionate extent [Article I (3) of the Fundamental Law]. These conditions result from the Fundamental Law itself and from the practice of the Constitutional Court, specifying it. In addition, however, it is unreasonable and disproportionate to require the existence of a "legitimate ground of public interest". In the petitioner's view, even the attribute of "legitimate" is a term which is hard to construe with regard to the aspects of legal certainty and the clarity of norms as one could not assume in the legal sense the existence of an "illegitimate" ground of public interest. The petitioner takes the view that the heavy criticism of politically exposed persons especially those exercising public authority, as long as such exercise remains within the constitutional bounds determined by the Constitutional Court, it shall always be in the interest of the public: It is a legitimate interest in the free formation of the public opinion, which is indispensable for democracy. The inclusion of the condition of "a legitimate ground of public interest" therefore leads to a precarious legal situation and a disproportionate restriction, which is a step backwards from the already contradictory judicial practice.

[4] Based on the above reasoning, the Commissioner for Fundamental Rights concludes that the normative text "on a legitimate ground of public interest" in Section 2:44 of the new Civil Code is in conflict with the requirement of the clarity of norms resulting from the principle of rule of law enshrined in Article B (1) of the Fundamental Law; moreover, it also prejudices the provisions of Article IX (1) and (2) of the Fundamental Law (freedom of speech and freedom of the press) as it allows disproportionate restriction of rights. The Commissioner initiated the annulment of the challenged normative text.

II.

[5] 1. The provisions of the Fundamental Law relevant to the present case are as follows:

"Article I (3) The rules for fundamental rights and obligations shall be laid down in an Act. A fundamental right may only be restricted to allow the effective use of another fundamental right or to protect a constitutional value, to the extent absolutely necessary and proportionate to the objective pursued and with full respect for the essential content of such fundamental right."

“Article II Human dignity shall be inviolable. Every human being shall have the right to life and human dignity; the life of the foetus shall be protected from the moment of conception.”

“Article VI (1) Everyone shall have the right to have his or her private and family life, home, communications and good reputation respected.”

“Article IX (1) Everyone shall have the right to freedom of expression.

(2) Hungary shall recognise and protect freedom and diversity of the press, and shall ensure the conditions for the free dissemination of information necessary for the formation of democratic public opinion.

(3) In the interest of the appropriate provision of information as necessary during the electoral campaign period for the formation of democratic public opinion, political advertisements may only be published in media services free of charge, under conditions guaranteeing equal opportunities, laid down in a cardinal Act.

(4) The right to freedom of expression may not be exercised with the aim of violating the human dignity of others.”

[6] 2. The relevant provision of the new Civil Code challenged by the Commissioner for Fundamental Rights are as follows:

“Section 2:44 [Protection of the personality rights of politically exposed persons]

The exercise of the fundamental rights relating to the free debate of public affairs may diminish the protection of the personality rights of politically exposed persons on a legitimate ground of public interest, to the extent necessary and proportionate, without prejudice to human dignity.”

III

[7] The petition is well-founded.

[8] 1. At the heart of the Commissioner for Fundamental Rights' reasoning is that the contested provision, in addition to infringing legal certainty, leads to a disproportionate restriction on freedom of opinion and of the press. Although Section 2:44 of the new Civil Code refers more broadly to fundamental rights for the free debate of public affairs, the Constitutional Court therefore reviewed and adjudicated the petition primarily in the context of Article IX of the Basic Law. In doing so, the Constitutional Court took into account the basic theoretical and historical justifications of freedom of speech and the press, as they provide relevant aspects for the interpretation of the Constitution in the field of criticism of politically exposed persons, then the Court took into account the main guidelines of its practice until the entry into force of the Fundamental Law and the case law of the European Court of Human Rights, and then reviewed what interpretations the provisions of the Fundamental Law correspond to, and on the basis of above the Court decided upon the constitutionality of the legal provision under review.

[9] 1.1 The theoretical justifications of freedom of speech and of the press can traditionally be classified into two broad groups. Among the justifications designated as instrumental, those that focus on the search for truth and the service of democratic public opinion deserve emphasis, while the justification that can be deemed constitutive is centred on individual self-expression and individual autonomy. In connection with the assessment of the petition at issue, the Constitutional Court mentions the basic aspects of theoretical and intellectual historical justifications because such aspects have a significant impact on the interpretation of the Constitution in the field of criticism of politically exposed persons.

[10] Under the first historical justification of freedom of speech, free expression of opinions must be ensured in order to seek the truth, because truth can manifest itself to people only in the free conflict of views and thoughts.

[11] Another later branch of instrumental justification emphasises the service of democracy in the context of freedom of expression. Based on the theory known as the democratic theory of freedom of speech, the participation of the citizens in public affairs is indispensable for democracy and democratic self-governance, which presupposes that participants can express their thoughts on issues affecting the community without impediment.

[12] The constitutive justification of freedom of opinion is based on the individual's self-expression, the importance of the individual's autonomous action. Accordingly, the right to free speech is justified not only by its role as an instrument in achieving certain results, but also by the fact that all people can express themselves and express their

thoughts without restrictions, as the value of free speech cannot be underestimated with regard to the advancement of one's personality.

[13] In the context of the criticism of public figures, the Constitutional Court does not consider the differences between the individual justifications to be relevant, but the fact that the fundamental interest in the freest possible debate on public affairs is a clear point of convergence for theories. The arguments for the primacy of individual self-expression also require freedom of expression in community affairs, and the emphasis on the common search for truth and the importance of democratic public opinion and development of informed political opinion requires the fullest possible freedom to debate public affairs.

[14] 1.2 The practice of the Constitutional Court established before the entry into force of the Fundamental Law included both individual aspects of the establishment of freedom of speech and of the press, as well as community aspects emphasising the importance of the formation of a democratic public opinion.

[15] In line with the practice followed since Decision 30/1992 (V. 26.) AB (hereinafter referred to as the "1992 Court Decision") establishing the constitutional interpretation of freedom of speech, freedom of expression is granted a special role among the constitutional fundamental rights, as it is a "maternal right" of several other freedoms, more commonly known as the fundamental rights of communication. With regard to the fundamental rights of communication it is important to note that, in addition to individual self-expression, it is the combination of rights that guarantee the individual's well-founded participation in the social and political life of the community. The Constitutional Court stressed that in addition to the subjective right of the individual to freedom of expression, the previously effective Constitution also entailed a State obligation to ensure the conditions for the formation and maintenance of democratic public opinion. "The objective, institutional aspect of the right to the freedom of expression relates not only to the freedom of the press, freedom of education and so on, but also to that aspect of the system of institutions which places the freedom of expression, as a general value, among the other protected values. For this reason, the constitutional boundary of the freedom of expression must be drawn in such a way that in addition to the person's subjective right to the freedom of expression, the formation of public opinion, and its free development, being indispensable values for a democracy, are also considered" [the 1992 Court Decision, ABH 1992, 167, 172].

The Constitutional Court reiterated this argumentation and applied it to freedom of the press as well when it stated that "[t]he State must guarantee freedom of the press, recognising that the press was the pre-eminent instrument for disseminating and moulding views and for the gathering of information necessary for individuals to form

their own opinions. […] The press is an instrument not merely of information, but also of free expression, since it is accorded a basic role in the process of gathering the information necessary for the formation of opinions." [Decision 37/1992 (VI. 10.) AB, ABH 1992, 227, 229].

[17] The Constitutional Court has also previously considered the issue of the conflict between freedom of expression and that of the press and the protection of the personalities of public figures in a criminal law context, and its interpretation of the Constitution in this case was guided by the considerations cited above. In Decision 36/1994 (VI. 24.) AB (hereinafter referred to as the "1994 Court Decision"), the Constitutional Court held that freedom of speech "requires special protection when it relates to public matters, the exercise of public authority, and the activity of persons with public tasks or in public roles. In the case of the protection of persons taking part in the exercise of public authority, a narrower restriction on freedom of expression corresponds to the constitutional requirements of a democratic State under the rule of law." (the 1994 Court Decision, ABH 1994, 219, 228). In line with the position of the Constitutional Court, value judgements expressed in the conflict of opinions on public matters enjoy increased constitutional protection even if they are exaggerated and intensified. "In a democratic State under the rule of law, free criticism of the institutions of the State and of local governments, even if done in the form of defamatory value judgements, is a fundamental subjective right of citizens, as members of the society, and that is an essential element of democracy" (the 1994 Court Decision., ABH 1994, 219, 230). As held by the Constitutional Court at the time, even in the period of the establishment and consolidation of the institutional system of democracy, no constitutional interest could be established that would have justified a criminal restriction on the communication of value judgements in the protection of the authorities and officials. The Constitutional Court, however, pointed out that the falsification of facts cannot be covered by constitutional protection; therefore, even criminal sanctions are not exaggerated if the person asserting the defamatory statement knew that his assertion was untrue or was unaware of its untruth due to his or her failure to exercise caution reasonably expected of him or her pursuant to the rules applicable to his or her profession or occupation.

[18] The Constitutional Court has also applied arguments relating to the dispute over public affairs in relation to civil law restrictions on freedom of expression. As emphasised in Decision 57/2001 (XII. 5.) AB reviewing the incorporation of the right of reply into the Civil Code, "the assessment of the constitutionality of the restriction is based on the particularly important role played by freedom of expression and freedom of the press in maintaining a democratic system, informing the community and forming public opinion. This role is at the forefront and therefore the restriction of these

freedoms is possible in a narrow scope when it comes to political debate or criticism of the State" [Decision 57/2001 (XII. 5.) AB, ABH 2001, 484, 494].

Finally, in Decision 165/2011 (VI. 20.) AB on certain issues related to media law, the Constitutional Court summarised its views about the justification of freedom of speech and that of the press, and in addition to freedom of self-expression it underscored the importance of the role of citizens played in forming democratic public opinion. "Thus, in the practice of the Constitutional Court, the right to free expression of opinion enshrined in Article 61 (1) of the Constitution has a double foundation: Freedom of opinion simultaneously serves the fulfilment of individual autonomy and the possibility of creating and maintaining democratic public opinion on the part of the community. […] The press is an institution of freedom of speech. Thus, the protection of freedom of the press, insofar as it serves the free expression of speech, communication and opinion, is also twofold: In addition to its subjective legal nature, it serves to create and maintain democratic public opinion on the part of the community. […] By exercising the right to freedom of the press, the holder of a fundamental right plays an active role in shaping democratic public opinion. In this capacity, the press monitors the activities of public actors and institutions, the decision-making process, and informs the political community and the democratic public (the role of the »watchdog«)." [Decision 165/2011 (XII. 20.) AB, ABH 2011, 478, 503].

[20] 1.3 The Constitutional Court has assessed the extent to which, after the entry into force of the Fundamental Law, it can rely on the previously established justifications and arguments in the interpretation of freedom of speech and of the press in the present case. In line with Decision 13/2013 (VI. 17.) AB, in the course of reviewing the constitutional questions to be reviewed in new cases, the Constitutional Court "may use the arguments, legal principles and constitutional correlations elaborated in its previous decisions if there is no impediment to the substantive conformity of a given section of the Fundamental Law with the Constitution, its contextual concordance with the Fundamental Law as a whole, the observance of the rules of interpretation of the Fundamental Law and the applicability of the findings on a case-by-case basis, and it appears necessary to include them in the statement of reasons for the decision to be taken" {Decision 13/2013 (VI. 17.) AB, Reasoning [32]}. The Constitutional Court therefore had to take into account, above all, the changes in the constitutional normative text, which were formulated in Article IX of the Fundamental Law in the field of freedom of opinion.

[21] At the time of the formation and consolidation of the Constitutional Court practice described above, Article 61 (1) of the Constitution provided that in the Republic of Hungary everyone had the right to freely express his opinion, and furthermore, to have

access to, and distribute information of public interest, and paragraph (2) contained that the Republic of Hungary recognised and respected freedom of the press. Effective as early as of 7 July 2010, the constitutional amendment authority amended Article 61 of the Constitution by inserting a new provision in paragraph (3) in addition to clarifying the wording of the first two paragraphs: "For the purpose of forming a democratic public opinion, everyone shall have the right to receive adequate information in respect of public affairs." Thus, the constitutional amendment authority did not affect the previously interpreted content of freedom of speech and of the press, and even enshrined at the constitutional level the double justification of these rights elaborated in constitutional court practice and incorporated the aspect of the formation of democratic public opinion into the Constitution.

[22] In the Fundamental Law, which entered into force on 1 January 2012, the legislator made provisions identical in content to the text of the Constitution thus amended. Under Article IX (1), everyone shall have the right to freedom of speech and pursuant to paragraph (2), Hungary shall recognise and protect freedom and diversity of the press, and shall ensure the conditions for the free dissemination of information necessary for the formation of democratic public opinion. Thus, in the Fundamental Law, the State's obligation to create the conditions for democratic public opinion appears in the scope of freedom of speech and the press with constitutional force from the very beginning. Although paragraph (3) of Article IX incorporated with the fourth amendment to the Fundamental Law regulates the special rules of political advertising during the election campaign, it should be mentioned that this provision also aims at the development of democratic public opinion to the fullest possible extent.

[23] On the basis of all the foregoing, the Constitutional Court found that the Fundamental Law reaffirmed the interpretation established in the practice of the Constitutional Court that freedom of speech and of the press has a double justification, that is, it is key for both individual self-expression and the democratic functioning of the political community. And the double justification confirmed in the Fundamental Law means that the interpretation of the privileged place of freedom of opinion in the field of fundamental rights remains valid. The Constitutional Court therefore adjudicated the petition in the light of and using the arguments set out in its previous decisions.

[24] In the present case, the former arguments related to the interpretation of freedom of speech remain applicable despite of the fact that there are further differences between the text of Article IX of the Fundamental Law and the that of the previous Constitution in the field of freedom of speech, and the difference found in Article IX (4) deals in particular with personality protection. Under the provision introduced by the fourth amendment to the Fundamental Law, the exercise of freedom of expression may not be aimed at violating the human dignity of others. However, the cornerstone of the

Constitutional Court's interpretation of freedom of expression from the outset was that the human dignity of others could be a barrier to freedom of opinion. [the 1992 Court Decision, ABH 1992, 167, 174]. It follows from the general rules on the restriction of fundamental rights that the essential constitutional issue was, and continues to be, in which cases the rules protecting human dignity qualify as necessary and proportionate limitations of freedom of speech [Article I (3) of the Fundamental Law]. The right to the protection of human dignity is only unrestricted as the legal determinant of human status, while as a general personality right and the resulting sub-rights can be restricted. In the context of the collision of freedom of speech and other fundamental rights in particular the right to having one's human dignity respected, the Constitutional Court has always taken account of the fundamental principle that "[t]he laws restricting freedom of expression are to be assigned a greater weight if they directly serve the realisation or protection of another fundamental subjective right" [the 1992 Court Decision, ABH 1992, 167, 178]. Accordingly the human dignity of others has been interpreted in the Constitutional Court's practice as a clear limitation over freedom of speech, and the Constitutional Court elaborated an interpretation of freedom of speech and freedom of the press, including the earlier arguments related to the possibility of criticising politically exposed persons, in the light of the above.

[25] 2.1 In considering the petition, the Constitutional Court also took into account the case law of the European Court of Human Rights (hereinafter referred to as the "Human Rights Court"). Hungary as a State Party joined the Convention on the protection of human rights and fundamental freedoms promulgated in Act XXXI of 1993 (hereinafter referred to as the "Convention"); therefore, the Constitutional Court applies, as minimum requirements of protecting rights in the course of elaborating the Hungarian constitutional standards, the aspects found in the case law of the Human Rights Court on the interpretation of the Convention {Decision 61/2011 (VII. 13.) AB, ABH 2011, 290, 321; reaffirmed in e.g. Decision 22/2013 (VII. 19.) AB, Reasoning [16]}.

The case law of Human Rights Court is rich in the elaboration of special standards on the limits of restricting the expression of opinions during any debate over public affairs. These particular standards unfold, in the field of debating public affairs, about the interpreting of freedom of speech guaranteed in Article 10 of the Convention a generally determining principle stating that this freedom, as one of the pillars of a democratic society, is a fundamental condition for both social progress and individual development, and it also protects opinions that offend, shock or disturb [Human Rights Court, Handyside v. the United Kingdom (5493/72), 7 December 1976, paragraph 49; reinforced e.g. by: Human Rights Court, Observer and Guardian v. the United Kingdom (13585/88), 26 November 1991, paragraph 59].

It was in Lingens v. Austria where the Human Rights Court first ruled in favour of freedom of public debate in contrast with personality protection. The Court underlined that freedom of political debate is at the very core of the concept of a democratic society, and freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. In line with the above, the Human Rights Court explained that the limits to the permissibility of criticism are wider for politicians than for individuals. There is no doubt that the reputation of others deserves protection against freedom of expression, and that protection also belongs to politicians, but in their case the requirements must be determined in the light of the interest in the free debate on public affairs. The sanction applied for failing to do so prevents the press from contributing to the public debate on matters affecting the life of the community and fulfilling the role of "watchdog" for the community. The Human Rights Court emphasized that a distinction had to be made between the statements of fact and value judgements as in the latter case the demonstration of reality could not be required. [Human Rights Court, Lingens v. Austria (9815/82), 8 July 1986, paragraphs 42–47]

On the basis of the arguments presented in Lingens v. Austria, it was the consistent position of the Human Rights Court that the expressions of political opinion were under special protection by Article 10. It reinforces the importance of the principle, applicable in general to the restrictions of freedom of speech, that exceptions to freedom of expression must be interpreted restrictively [*see* one of the recent decisions reaffirming the above in Human Rights Court, Cholakov v. Bulgaria (20147/06), 1 October 2013, paragraphs 29–31].

[29] As a further argument in favour of greater criticism of politicians in public affairs, the Human Rights Court stated that politicians consciously and inevitably expose themselves to the close observance of all their words and actions by both journalists and the general public. Consequently, they need to be more patient with criticism, especially when they themselves are involved in the public debate [Human Rights Court, Oberschlick v. Austria (11662/85), 23 May 1991, paragraph 59].

[30] The case law of the Human Rights Court later made it clear that the enhanced protection of opinions expressed in the context of public affairs is not limited to political debates and politicians in the strict sense. On the one hand, in addition to political party debates, the freedom to discuss other issues affecting the community is particularly protected by the right to freedom of expression guaranteed by the Convention.[Human Rights Court, Thorgeirson v. Iceland (13778/88), 25 June 1992, paragraph 64]. On the other hand, the ECtHR raises the overriding argument of disputing public cases not only in cases where the disputed statement concerns politicians or officials, but also where the public interest issue in question (also) concerns individuals. In the latter case, the tolerance threshold for individuals should

also increase [Human Rights Court, Bladet TromsØ and Stensaas v. Norway (21980/93), 20 May 1999].

[31] The application of specific criteria is therefore not determined by the status of the person concerned per se, but by the public nature of the opinion. However, with regard to politically exposed persons, in particular politicians, there may be cases where, in special circumstances relating to the discussion of public affairs, the public's right to information must be taken into account not only in relation to the public role itself but also in the privacy of the person concerned. [Human Rights Court, Von Hannover v. Germany (no. 2) (40660/08 and 60641/08), 7 February 2012, paragraph 110].

[32] However, the Constitutional Court points out that the complex system of criteria in the case law of the Human Rights Court takes into account additional circumstances, even within public authorities, as arguments concerning politicians exercising public power or public figures do not necessarily apply equally to all civil servants. There is no doubt that the scope for criticism should be broader for all of them, but not necessarily reach the level of politicians [Human Rights Court, Thoma v. Luxembourg (38432/97), 29 March 2001, paragraph 47]. In line with this, the Human Rights Court takes into account, for example, that actors in the judiciary, in particular judges, are more vulnerable to criticism of their identities. Therefore, although freedom of debating public affairs must be granted a wide berth in relation to judicial decisions as well, the Human Rights Court added in the context of criticism affecting the judges in person that for the purpose of safeguarding the public confidence in the justice system, judges must accordingly be protected from destructive attacks that are unfounded, especially in view of the fact that judges are subject to rules of professional conduct that precludes them from replying to criticism [Human Rights Court, De Haas and Gijsels v. Belgium (19983/92), 27 February 1997, paragraph 37].

[33] The Constitutional Court emphasizes that, although the above findings were first explained by the Human Rights Court mostly in relation to criminal restrictions on freedom of expression, they have been applied consistently with regard to legal consequences in other branches of law. For example the Court took account of the above arguments in respect of legal sanctions including the payment of damages in a civil law case of Wabl v. Austria or Jerusalem v. Austria, or regarding a media law rule in the Print Zeitungsverlag Gmbh. v. Austria [Human Rights Court, Wabl v. Austria (24773/94), 21 March 2000 and Human Rights Court, Jerusalem v. Austria (26958/95), 27 February 2001, and Human Rights Court, Print Zeitungsverlag Gmbh. v. Austria (26547/07), 10 October 2013]. Accordingly, the special protection of freedom of political speech is a requirement in the judicial practice of Human Rights Court penetrating the whole of the legal system, and it needs to be applied, by taking other aspects into account as well, in each case when the challenged expression is voiced in questions affecting the community in the course of debating public affairs.

[34] 2.2 The Constitutional Court also mentions that the constitutional arguments concerning the increased protection of opinions expressed in the debate in public affairs and, in this context, the wider criticism of politically exposed persons, are the common denominators of developed democracies. To illustrate this, following a more detailed description of the case law of the Human Rights Court governing Hungary, the Constitutional Court also briefly refers to the case law of the United States Supreme Court (hereinafter referred to as the "U.S. Supreme Court"). In order to strike a balance between the protection of reputation and freedom of expression, the U.S. Supreme Court has also developed a system of criteria that takes into account both the status of the victim and the public nature of the disputed speech. The Constitutional Court lists the principles of this system of criteria.

[35] According to the basic test developed by the U.S. Supreme Court in New York Times v. Sullivan, damages for a defamatory allegation of the official conduct of public officials can only be constitutionally awarded if it is proved that the person making the allegation acted in bad faith, that is, he was aware that the allegation was untrue, or he knew it was untrue because he had acted with serious negligence in examining its truth. This test is based on a constitutional argument stating that public debate should be uninhibited, robust, and wide-open. [376 U.S. 254 (1966)].

Later the U.S. Supreme Court extended the New York Times-standard to all statements made in relation to candidates to public offices and all to politically exposed persons in general. As justified in the Gertz v. Welch case, similarly to those holding public office, public figures usually enjoy significantly greater access to the channels of effective communication, and, on the other hand, they typically choose to put themselves in the public spotlight, thereby voluntarily exposing themselves to a greater risk of claims that damage their reputation. In this respect the U.S. Supreme Court also pointed out that under the constitution there is no such thing as a false idea and there is no constitutional value in false statements of fact, still in a certain scope the latter are necessary elements of free debate [418 U.S. 323 (1974)].

From the complex set of criteria elaborated by the U.S. Supreme Court the Constitutional Court highlights the element of emphasising the public nature of the concerned statement in addition to the politically exposed person status of the involved person when defamatory statements are assessed; thus, even the cases that are beyond the scope of public appearances do not belong to the same group. The U.S. Supreme Court applies a different test where an individual is slandered in connection with a dispute in public matters than where the reputation of the same individual is harmed in a non-public interest matter. As explained in the reasoning of Dun & Bradstreet v. Greenmoss Builders, speeches do not bear the same constitutional

importance: Debating public affairs belongs to the very essence of constitutional protection, while speeches related exclusively to private interests bear less constitutional importance [472 U.S. 749 (1985)].

IV

[38] 1. The Constitutional Court then interpreted the freedom of speech and the press enshrined in Article IX of the Fundamental Law, taking into account the theoretical principles of its previous practice and the case law of the Human Rights Court, which are shared by developed democracies.

[39] 1.1 The right to free expression occupies a privileged place in the fundamental rights order of the Fundamental Law. This privileged role of freedom of opinion has a double justification: It is a particularly precious right for both the individual and the community. Freedom of speech is indispensable for the full development of individual autonomy, as one's personality can only be evolved if the person is free to communicate his or her views and thoughts to others without any restriction of content. Free self-expression by free persons is one of the essential elements and the essence of the constitutional order based on the Fundamental Law. On the other hand, freedom of expression is the foundation of a democratic, pluralistic society and public opinion. Without the freedom and diversity of social and political debates, there is neither democratic public opinion nor democratic rule of law. Democratic public opinion requires that all citizens of society be able to express their thoughts freely and thus become active in shaping public opinion. The widespread provision of freedom of opinion leads to the intellectual enrichment of the community, as the elimination of erroneous, rejected views is only possible in open public debate. Thus, in addition to guaranteeing the subjective right to freedom of expression, the State must also guard over pluralism in order to form and maintain a democratic public opinion.

[40] Freedom of the press, which encompasses the freedom of all types of media, is an institution of freedom of expression. Indeed, despite the increasingly complex and diversified nature of its activities, the press is first and foremost a means of expressing opinions, forming opinions and obtaining information that is essential for forming opinions. The privileged nature of freedom of expression in this respect also applies to freedom of the press, and it is also subject to the double justification of freedom: The importance of freedom of the press is justified by both subjective fundamental rights and the constitutional institution of democratic public opinion. Accordingly, Article IX (2) of the Fundamental Law not only recognises freedom of the press but it

also provides for securing the conditions of free information necessary for the development of democratic public opinion.

[41] The Constitutional Court emphasises that the two types of justification and content of freedom of speech and the press, that is, the individual side focusing on individual self-expression and the institutional side focusing on democratic public opinion, are not competing, let alone weakening, but mutually complementary and mutually supportive constitutional considerations. Either side may enjoy primacy from time to time, but altogether they reinforce each other, even in a very specific way with regard to certain constitutional issues. Clearly, such a constitutional issue is the problem of the conflict between freedom of expression and the protection of the personalities of public figures.

[42] 1.2 The privileged role of freedom of expression means that, on the one hand, it must allow it only in exceptional cases against the other rights or constitutional values raised for its restriction and, on the other hand, laws restricting free expression must be interpreted strictly. "The laws restricting freedom of expression are to be assigned a greater weight if they directly serve the realisation or protection of another fundamental subjective right, a lesser weight if they only protect such rights indirectly through the intermediary of an "institution", and the least weight if they merely serve some abstract value as an end in itself (public peace, for instance)" [the 1992 Court Decision, ABH 1992, 167, 178]. In the restrictions the double, mutually reinforcing, justification of freedom of speech must be taken into account, "for this reason, the constitutional boundary of the freedom of expression must be drawn in such a way that in addition to the person's subjective right to the freedom of expression, the formation of public opinion, and its free development, being indispensable values for a democracy, are also considered" [the 1992 Court Decision, ABH 1992, 167, 172]. Freedom of the press is also subject to the rules governing restrictions on freedom of expression, together with the fact that they must be adapted to the specificities of the operation of the press.

[43] It follows directly from the constitutional place of human dignity that it can be a restriction even on freedom of opinion, which has a privileged role. The text of Article IX (4) of the Fundamental Law made it clear as well. It is therefore undisputed that freedom of expression must, where appropriate, yield to human dignity. However, in accordance with the general rule on the restriction of fundamental rights specified in Article I (3) of the Fundamental Law, in such cases the constitutional issue is centred around whether the restriction of freedom of speech by human dignity can be considered necessary and proportionate. It is clear that any connection between a given regulation and human dignity cannot in itself justify a restriction on freedom of

expression. Otherwise, the content of freedom of expression would be vacated, as a very wide range of legal provisions are closely or distantly related to human dignity and the rights deriving from it. The right to the protection of human dignity is unrestricted only as a legal determinant of human status, while as a general right of personality and the rights of personality derived therefrom may be restricted. Such restriction can be found in Section 2:44 of the new Civil Code, as an exception from the general rule of the protection of the personality rights specified in Section 2:43.

[44] The Constitutional Court must therefore assess whether a restriction on freedom of expression in the protection of human dignity is justified on the basis of the constitutional considerations which arise in the particular case. In doing so, it must also be taken into account that certain rights arising from human dignity are also protected in a separate provision of the Fundamental Law. Article VI (1) of the Fundamental Law provides constitutional protection for the right to have one's private life and reputation respected.

[45] 1.3 Freedom of expression in public affairs is one of the innermost protections of freedom of expression and the press, as it is subject to the double justification of freedom of expression with particular force and clarity. From the point of view of the freedom of individual self-expression, having a say in the affairs of the community, and thus active participation in social processes, is one of the most important fields for the development of personality. From the Community point of view of democratic public opinion and the development of informed political opinion, the free expression of diverse social and political views is the most important requirement.

[46] The emphasis on the importance of public expression does not mean that other types of speeches are not subject to the considerations set out by the Constitutional Court in the context of its privileged fundamental right to freedom of expression, but it means that, when restricting speech on political and other public affairs, these considerations must be enforced with particular rigour.

[47] The focus of public opinion and protection on public affairs is not primarily on the status of those affected by the speech, but on the fact that the speaker has expressed his or her views on a social or political issue. Accordingly, the constitutional concerns about public speaking can be applied in a scope wider than the that of opinions concerning the persons exercising public authority or public officials and not all types of communication, including the ones that are not related at all to public affairs, are to be assessed on the basis of such concerns.

[48] Speech concerning politically exposed persons is, however, a central component of political expression. The essential part of the discussion of public affairs is the

manifestations concerning the activities, views and credibility of the persons that shape public affairs. In a significant part of social and political debate politically exposed persons and others who participate in public debate criticise, typically by making use of the press, each other's views, political performance and, in this context, also the personality of the other person. The constitutional mission of the press is to control the exercise of public power, an integral part of which is the presentation and, even extremely sharp, criticism of the activities of individuals and institutions involved in shaping public affairs. Thus, despite the fact that the focus of public opinion is on public affairs themselves, rather than on public figures, the vast majority of expressions concerning the personalities of those shaping public affairs necessarily and inevitably fall within the scope of political expression. The outstanding constitutional significance of the debate on public affairs, therefore, means that the narrower restriction of the freedom of speech and the press in the protection of the personalities of public figures meets only the requirements deriving from the Fundamental Law. It is a particularly important constitutional interest for citizens and the press to be able to participate in social and political debate without uncertainty, compromise or fear. This would be countered by the fact that speakers would have to fear a wide range of legal liability in order to protect the personalities of public figures. (the 1994 Court Decision., ABH 1994, 219, 229). These requirements apply not only to criminal liability but also to civil law consequences. The widespread possibility of applying damages, pecuniary restitution in the system of the new Civil Code, can also be a serious deterrent to participation in public disputes.

[49] 1.4 Freedom of expression extends to statements that express a value judgment and express an individual's personal beliefs, regardless of whether the opinion is valuable or worthless, right or wrong, respectable, or to be rejected. Expressions containing a statement of fact are also part of freedom of speech. On the one hand, the communication of a fact can also express a personal opinion, and on the other hand, without the communication of facts, it would be impossible to form an opinion. However, when marking the boundaries of freedom of expression and of the press, it is appropriate to distinguish between the protection of value judgements and the protection of factual statements (the 1994 Court Decision, ABH 1994, 219, 230). While in the case of opinions, proving falsehood is incomprehensible, provably false facts are not in themselves constitutionally protected.

[50] Enhanced protection of political expression applies both to value judgements in public affairs and to statements of fact in public affairs. On the one hand, in a democratic State under the rule of law, the free criticism of the operation and the activities of the institutions of the State and of the politicians whose profession is to form the democratic public life is a fundamental right of the citizens, the members of

the society and the press, which is an essential element of democracy. On the other hand, since opinions are typically formed on the basis of the communicated facts, the interest in rendering the flow of public debate as free as possible should be taken into account in the scope of determining the level of culpability and the potential legal sanctions during the assessment of legal liability even if the communicated facts do not bear a constitutional value and they prove to be false.

[51] 2. The Constitutional Court then assessed the extent to which the rule contested in the petition complied with the constitutional requirements set out above.

Under Section 2:44 of the new Civil Code, exercising the fundamental rights guaranteeing freedom of debate over public affairs may restrict on a legitimate ground of public interest, to the extent necessary and proportionate, the protection of the personality rights of a politically exposed person without prejudice to human dignity. In the course of creating the new Civil Code, the legislator was clearly taking into account the constitutional aspects discussed in the context of debating public affairs and it established a statutory ground for narrowing down the protection of the personality rights of politically exposed persons. On this statutory basis, those applying the law have the opportunity to develop precise criteria for the criticism of politically exposed persons. Given the complex nature of the issue, it is not possible to set a mechanically applicable legal standard for resolving the conflict between political freedom of opinion and the protection of the individual, which is valid in each case; therefore, those applying the law are in a position to consider the relevant circumstances that arise. In doing so, they should always pay attention to the enhanced protection of socio-political expression in public affairs. The new Civil Code formulates three aspects for this consideration: The condition for limiting the protection of the personality of a public figure is that it be done in the legitimate public interest, be necessary and proportionate, and not prejudice human dignity. In line with the interpretation of the regulation, exercising freedom of speech depends on complying with three additional conditions at the same time, if the protection of a politically exposed person's personality rights is at stake.

[53] In the present case, the Constitutional Court has the opportunity, in an abstract norm control procedure, to examine whether these considerations are *in abstracto* in conformity with the requirements deriving from the Fundamental Law. Among the considerations found to be constitutional, it is the task of the courts *in concreto* to shape and detail law enforcement practice in accordance with freedom of expression, over which the Constitutional Court may exercise constitutional control in the framework of its other competences.

[54] Although the Commissioner for Fundamental Rights contested only one of the provisions of the new Civil Code, the condition of "a legitimate ground of public interest", holding the two other conditions constitutional, the constitutionality of one element of a regulation cannot be assessed independently from the others; therefore, the Constitutional Court reviewed the petition with regard to all three conditions. The wording of the new Civil Code approaches the issue from the point of view of personal protection and concerns the limitation of the protection of the privacy rights of public figures; however, the Constitutional Court assessed the conditions in question from the point of view of freedom of speech and press. In this respect, the legislator has set the limits to the exercise of freedom of expression and of the press, subject to the conditions of restriction of personal protection, which must comply with the constitutional requirements for the restriction of fundamental rights set out in Article I (3) of the Fundamental Right.

[55] On the basis of the above, the Constitutional Court finds that the protection of the personality arising from human dignity may restrict the freedom of expression of public figures, to a lesser extent than others, but also in the case of public figures. Consequently, with respect to Article II of the Fundamental Law safeguarding human dignity and to Article VI (1) prescribing respect to the private life and the reputation of persons, the necessity to restrict freedom of speech and freedom of the press by virtue of Section 2:44 of the new Civil Code can be verified in an abstract way in relation to the above mentioned personality rights. However, the Constitutional Court had to assess whether the specific conditions contained in the provision are in compliance with the constitutional requirements of the restriction [Article I (3)].

[56] 2.1 Pursuant to the provisions of the new Civil Code, the expressing of opinions for the purpose of freely debating public affairs may only restrict the protection of the personality rights of a politically exposed person "to the extent necessary and proportionate". The Constitutional Court maintains that the primacy of freedom of speech is rendering Article I (3) of the Fundamental Law prescribed for the judiciary more specific, and it is also in line with the requirements that may be derived from Article IX of the Fundamental Law, under which the conflict between freedom of opinion and the protection of personality rights in the field of debating public affairs is to be resolved by way of a complex system of criteria. Accordingly, this condition, while adhering not to general terms used in private law but in constitutional law, provides the necessary and sufficient room for manoeuvre for the application of the law to develop standards for the boundaries of political expression.

[57] When applying the law, it must first and foremost be taken into account that, as the focus of political freedom of opinion is primarily on public affairs themselves and

not on public actors, all public affairs speeches are subject to enhanced protection, thus limiting the protection of the personal rights of those concerned. Thus, the limitation of the protection of personality is not only the rule that applies to those who take on professional public office, as the discussion of public affairs may, to the extent of a specific social debate, affect a wider range of persons. However, the status of the person affected by the speech cannot be ignored either: In the case of persons exercising public power and politicians in public office, the limited protection of the personality is more broadly considered "necessary and proportionate" than anyone else. Firstly, they have become more active in shaping public affairs than others at their own discretion, thus, undertaking public assessments and criticisms of the community concerned, so they must be more patient in tolerating statements that affect or qualify them in public affairs. Secondly, public officials and public politicians are able to use the media more widely and more effectively against the attacks they face. Thirdly, in their case, the criticism and qualification of their person is treated by the social public in a different way, as a necessary part of the democratic debate, typically as a manifestation to be interpreted along different political interests. In Hungary, the peculiarities of the operation of the plural political public have developed in the recent period, among which the public can evaluate what has been said during public debates with due care.

[58] Where these arguments are weaker with respect to certain persons exercising public authority because of the nature of their profession, the scope of protecting their personality can become broader: For example, due to the regulations pertaining to their service, judges are not in a position to defend themselves against the offences in public, therefore due account must be paid to prevent undermining public confidence in courts, indispensable for the operation of a State under the rule of law, by unfounded and extreme offences, but at the same time the open discussion of judgements has to be guaranteed to a wide extent.

[59] By taking into account all the above, the term "to the extent necessary and proportionate" in Section 2:44 of the new Civil Code provides a possibility for the courts to elaborate the standards of restricting the personality rights of politically exposed persons.

[60] 2.2 Under the new Civil Code, the boundaries of freedom of expressing political opinions should be drawn by the judiciary in a way that prevents the violation of human dignity even in the case of politically exposed persons. The Constitutional Court holds that this condition in itself is also consistent with Article IX of the Fundamental Law as human dignity can be a limit over freedom of expression. In accordance with the constitutional concerns manifested in this condition set by the new Civil Code, in a

certain scope, the human dignity of politically exposed persons also needs to be protected against freedom of speech. However, the question of the constitutionality of the judicial practice in the context of the provision of the new Civil Code under review depends upon whether the courts develop tests that secure the free debating of public affairs, specifying in specific cases, that is, in the course of personally enforcing claims for the protection of specific personality rights or the general personality right, when freedom of speech must withdraw to pay respect to the human dignity, the private life or the reputation of a politically exposed person. The unrestricted aspect of human dignity contained in Section 2:42 of the new Civil Code can only be regarded as an absolute limit on freedom of speech only in a very narrow scope of opinions expressed that negate the foundations of human status.

[61] In this context, the Constitutional Court holds applicable in the case of liability under civil law as well that in a democratic State under the rule of law, the free criticism, let it be of even very harsh or offensive, of the operation and the activities of the institutions of the State and of the politicians whose profession is to form the democratic public life is a fundamental right of the citizens, the members of the society and the press, which is an essential element of democracy. Consequently, the Constitutional Court considers that an expression of opinion containing a value judgement about a person exercising public authority or about a politician acting in public, stated in the context of public affairs, shall not, in general, be suitable to assume civil law liability. The arguments detailed above, in particular the voluntary undertaking of public appearance, the access to effective tools of communication and the political publicity as the framework of interpretation, do not justify in this scope of individuals the possibility of offering a legal way to find a remedy against the value judgements connected to the debate of public affairs. The Constitutional Court reiterates to the fact that the arguments supporting the lack of legal liability can become weaker with regard to certain persons exercising public authority, for example judges, and it may result, by way of departing from the general rule, in opening up the possibilities of protecting their personality rights to an extent narrower than in the case of persons not affected by public debate.

[62] The Constitutional Court emphasises that all this does not mean that the protection of the human dignity, privacy and reputation of the persons concerned, and thus the condition of the new Civil Code in question, is vacated. Persons exercising public power and politicians in public office are also entitled to the protection of personality if the value judgement affects them not in the context of disputing public affairs, not in connection with their public activities, but in connection with their private or family life. Enforcing liability under civil law can also be justified in the narrow scope when the value judgement qualifies as the total, explicit and severely defaming negation of the human status of the affected person, violating the unrestricted aspect

of human dignity laid down in Article 2:42 of the new Civil Code rather than the personality rights specified in Section 2:42. In addition to taking into account the above, politically exposed persons may also seek legal protection against false allegations.

[63] In addition, the limits to be set for the expression of an opinion to challenge public affairs with a view to the protection of human dignity, for example in the case of other persons, must also be determined by judicial practice.

[64] 2.3 In addition to all the above, the new Civil Code would set a further condition for the enforcement of the fundamental rights guaranteeing free public debate, in particular, freedom of speech and freedom of the press, by specifying that the restriction of the protection of the personality rights of politically exposed persons could only happen "on a legitimate ground of public interest". The Constitutional Court held that this condition was an unjustified restriction on freedom of speech and freedom of the press, thus violating Article IX (1) and (2) of the Fundamental Law.

In line with the constitutional character of expressing opinions in public matters, exercising freedom of speech in the interest of having free social debate is not only a "legitimate ground of public interest" in each and every case, but it is also a constitutional interest of paramount importance. It is in this spirit that restricting the protection of the personality rights of politically exposed persons for the purpose of guaranteeing the exercise of freedom of speech is in each case a constitutional interest and requirement. Therefore, there is no need for justifying any further indefinable "public interest" still less the "legitimate" nature of this public interest for the purpose of opening a possibility for criticising politically exposed persons to an extent significantly wider than in case of others. This condition of the new Civil Code would narrow down in an unjustified manner the scope of freedom of speech, as criticising politically exposed persons to a wide extent would only be allowed after verifying the existence of further public interest in addition to the constant social interest related to debating public affairs.

[66] The Fundamental Law attaches importance to the public interest in itself in relation to a single fundamental right, the right to property (Article XIII of the Fundamental Law). According to the provision on the restriction of fundamental rights [Article I (3) of the Fundamental Law], a fundamental right, such as freedom of speech, can only be restricted in the interest of enforcing another fundamental right or the protection of a constitutional value. As the "legitimate ground of public interest" not detailed and not specifically defined in the new Civil Code does not fall within this category, it is a condition stepping beyond the limits set by Article I (3) of the Fundamental Law.

[67] The statutory condition of "a legitimate ground of public interest" is unjustified despite acknowledging the fact, detailed above by the Constitutional Court, that the judiciary should have a scope of discretion in developing the judicial practice in accordance with the complex system of constitutional criteria about the conflict of freedom of speech and the protection of the personality rights of politically exposed persons. As pointed out by the Constitutional Court with regard to the two other conditions of the challenged provision of the new Civil Code, they offer sufficient margin for the enforcement of all the relevant aspects; therefore, constitutionally, there is no possibility for those applying the law to examine the existence of an additional condition. The constitutional aim of the rule contained in Section 2:44 is to set the limits of freedom of speech affecting politically exposed persons by taking into account Article II and Article VI (1) of the Fundamental Law. While the terms "to the extent necessary and proportionate" and "without prejudice to human dignity" closely link the limits of exercising freedom of speech to the protection of the personality rights of the politically exposed person affected, the term "legitimate ground of public interest" would extend the potential scope of restrictions over the aspects of the protection of personality rights.

[68] Taken as a whole, the term "legitimate ground of public interest" would raise an additional condition for the exercise of freedom of speech in political and public matters that could not be justified constitutionally, thus restricts unnecessarily freedom of speech and freedom of the press guaranteed in Article IX (1) and (2) of the Fundamental Law. On the basis of all the above, the Constitutional Court annulled the text "on a legitimate ground of public interest" in Section 2:44 of the new Civil Code; therefore, it shall not enter into force on 15 March 2014.

The publication of this Decision of the Constitutional Court in the Hungarian Official Gazette is based upon Section 44 (1) of the Act on the Constitutional Court.

Dr. Péter Paczolay, sgd.,
Chief Justice of the Constitutional Court
Justice delivering the opinion of the Court

Dr. Elemér Balogh, sgd.,
Justice

Dr. András Bragyova, sgd.,
Justice

Dr. Imre Juhász, sgd.,
Justice

Dr. Péter Kovács, sgd.,
Justice

Dr. Miklós Lévay, sgd.,
Justice

Dr. László Salamon, sgd.,
Justice

Justice

Dr. Péter Szalay, sgd.,
Justice

Dr. Béla Pokol, sgd.,
Justice

Dr. István Balsai, sgd.,
Justice

Dr. Péter Paczolay, sgd.,
Chief Justice of the Constitutional Court
on behalf of
Dr. István Stumpf
Justice, prevented from signing

Dr. Egon Dienes-Oehm, sgd.,
Justice

Dr. László Kiss, sgd.,
Justice

Dr. Mária Szívós, sgd.,
Justice

Dr. Barnabás Lenkovics, sgd.,

BALSAI, J., dissenting:

[70] I do not agree with the majority opinion of the Constitutional Court as follows; therefore, I shall attach the following dissent pursuant to Section66(2) of the ActCLIof2011 on the Constitutional Court (hereinafter referred to as the "Constitutional Court Act").

[71] 1. The majority opinion bases the substantive decision on the previous practice of the Constitutional Court. As I indicated during the court session, the topicality of these previous decisions of the Constitutional Court and their relevance to the present case are, in my view, highly questionable. In addition to the provisions of the Fundamental Law, in my view, when describing the usability of previous decisions of the Constitutional Court, the description of the case on which the given decision is based should be a key aspect. Given that the majority opinion did not allow for this, I will address this in my dissenting opinion. Decision 30/1992 (V. 26.) AB, invoked by this Decision, was aimed at establishing the unconstitutionality of the incitement against a community set forth in Section 269 of Act IV of 1978 on the Criminal Code (hereinafter referred to as the “Criminal Code”), partly on the basis of a petition for an ex post norm control and partly on judicial initiative. The decision adopted by the Constitutional Court at that time was based specifically on an examination of the means of criminal law and their place and role in the system of criminal law. In this decision, the Constitutional Court specifically emphasised that the social tensions that inevitably accompany the change of regime, as well as the special historical circumstances, were taken into account in formulating its decision. It must not be forgotten, therefore, that

this is a decision made in a specific historical situation, in practice the development of the constitutional content of expression of opinion and freedom of the press, which had not existed at all before, has gained space, emphatically from a criminal law perspective.

[72] Just as Decision 37/1992 (VI. 10.) AB cannot be considered relevant, as it reviewed the point of a decision of the Council of Ministers in the context of ex post norm control and ex officio proceedings for the elimination of unconstitutionality, which stated that "Hungarian Radio and Hungarian Television shall be subject to the supervision of the Council of Ministers". In connection with this regulation, the Constitutional Court assessed the legal environment at that time and came to the conclusion that an unconstitutional omission had occurred due to the lack of guarantee provisions [the reasoning of the decision was largely taken over from that of Decision 30/1992 (V. 26.) AB]. The description of the legislative change that has taken place in the meantime would be omitted here, as it would go beyond the spatial limits of this dissenting opinion.

[73] Decision 36/1994 (VI. 24.) AB also classified one of the statutory definitions of the Criminal Code. The Constitutional Court reviewed the criminal law regulation of the insult of an authority or official and took a position only within the framework of criminal law, keeping in mind its system of instruments in a complex way. In this decision, the Constitutional Court stated in the form of a constitutional requirement that the scope of non-punishable expression of opinion in relation to persons and institutions exercising public power, as well as politicians in public office, is wider. This decision is also largely based on the reasoning of Decision 30/1992 (V. 26.) AB, while, as a matter of course, omitting the reference to the specific historical situation.

[74] I therefore consider that my doubts as to the application of these decisions in the present case (and even to the substantive reasoning) are not entirely unfounded. In my view, the majority opinion was found wanting in the assessment of the compatibility of the Fundamental Law with the new Civil Code, which has not yet entered into force, and did not and could not replace it by invoking previous Constitutional Court decisions, as they related to other legal provisions in other historical contexts.

[75] 2. I cannot go silently by the part of the reasoning based on a breach of legal certainty, not least because, ultimately, the majority opinion relies upon this very part its finding of unconstitutionality by non-conformity with the Fundamental Law and annulment.

[76] My fundamental concern in this respect is independent of the specific case. In general, I do not consider it fortunate to repeal a legislative provision that has not yet

entered into force, on the grounds that its interpretation could be a problem for those applying the law. The possibility of a possible divergent interpretation by those applying the law is not in itself an absolute ground for annulment; a number of means are available to eliminate it. In the case of the courts, for example, the decision of the Curia (Supreme Court) adopted in proceedings to safeguard the uniformity of the law (which can now be reviewed by the Constitutional Court from a constitutional point of view), but the acting judge may also initiate a Constitutional Court proceedings in person if he or she considers that he or she should apply a legal provision with an interpretation contrary to the Fundamental Law (also) in the specific case before him, and in addition the institution of a constitutional complaint is also available. However, the annulment of a legislative provision in such a way that no (logical) information is available on its practical application could not be examined by the petitioning Commissioner either, as it is a new element not included in the previous legislation at all, which, in my view, is not an acceptable solution.

[77] 3. In addition to the above, as I mentioned during the substantive hearing of the case, I would have considered it essential in the present case to carry out the fundamental rights test, which, in my view, would have greatly helped to see the case clearly. I also considered it important to do this because it is a "conflict" of fundamental rights, where one of the fundamental rights (the right to human dignity) also has an unrestricted element. Thus, it would have been particularly important to define the essential content of the fundamental right and to limit its possible restriction. I consider this step all the more important because, in my view, the draft has approached the fundamental constitutional issue in reverse. In the present case, it is not the restriction of freedom of the press or expression of opinion that is the starting point, but the protection of human dignity and its limitability. This, in turn, raises the issues in a completely different light.

[78] To sum up, I consider that the majority opinion did not provide sufficient grounds for declaring and annulling the contested legislative provision to be unconstitutional; therefore, I could not support it.

Budapest, 3 March 2014

Dr. István Balsai, sgd.,
Justice

[79] I second the above dissenting opinion:

Dr. Mária Szívós, sgd.,
Justice

DIENES-OEHM, J., dissenting:

[80] I do not agree with the operative part of the decision and its reasoning.

[81] 1. I find unacceptable the legal basis and substantiated reasons for the decision finding unconstitutionality by conflict with the Fundamental Law and annulment of the normative text "on a legitimate ground of public interest" of Section 2:44 of Act V of 2013 on the Civil Code.

[82] Pursuant to the Reasoning for this Decision above, the text to be annulled "would raise an additional condition for the exercise of freedom of speech in political and public matters that could not be justified constitutionally, thus restricts unnecessarily freedom of speech and freedom of the press guaranteed in Article IX (1) and (2) of the Fundamental Law". The summary of the Reasoning quoted here is in essence based on the decisions of the Constitutional Court made in the immediate aftermath of the change of regime, not in civil law, but in criminal law cases. This is debatable both in terms of form and content, as despite the fourth amendment to the Fundamental Law, it does not take into account the changed constitutional situation, the actually changed circumstances or what has happened in public life.

[83] (a) According to the eleventh sentence of the "National Avowal" in the Fundamental Law, "that individual freedom can only be complete in cooperation with others." Comparing this requirement with the title of the section "Freedom and Responsibility" regulating fundamental rights, it is clear that the fundamental change in the Fundamental Law compared to the previous Constitution was that the legislator wanted part with the previously established practice of restricting individual freedoms. It can be deduced from the interpretative framework referred to here that the exercise of a fundamental right comes with responsibility and the abusive exercise of a right may harm the interests of the public.

[84] Naturally, freedom of expression and opinion cannot be an exception to this new constitutional requirement under the Fundamental Law. Consequently, the display of the public interest in Section 2:44 of the new Civil Code, which has not yet entered into force and regulates the protection of the right to privacy of a politically exposed person, can in no way be considered unconstitutional under the Fundamental Law.

[85] (b) The consideration of the public interest as opposed to the events of the past, compared to the transition from dictatorship to democracy, when individual freedom seemed almost unrestricted to the majority of society, is supported by changed circumstances, especially recent events.

[86] The non-fulfilment or partial fulfilment of many (often exaggerated) expectations of regime change and European integration, economic policy mistakes of the last decade due to objective difficulties, and then in 2006 political aggravation, increased the former sporadic dissatisfaction into social unrest. The economic crisis of 2008 has so far severely hampered and sometimes made impossible the complete elimination of these negative conditions, worsened society's overall sense of security and increased political and psychological fissures and divisions. Unfortunately, public life, the style and daily practice of debating public affairs, with turbulent speed, reflected the unrest and division of society, with the direct consequence of a roughening of the debate over public life and public affairs. It should be emphasised that following the economic crisis that arose in 2008, all these phenomena were not only experienced in Hungary, but to a greater or lesser extent in almost all countries of the European Union.

[87] The mass abuse of the right to freedom of expression and the press is likely to disrupt public order. In more serious cases, it can also contribute to undermining confidence in democracy and the functioning of democratic institutions. In order to avoid all this, it is therefore necessary to take into account the public interest in a proportionate manner in the light of the current situation. With regard to the free debate on public affairs, recent events justify the judicial and law enforcement practice in the public interest, with a view to safeguarding public order.

[88] 2. The original provision proposed as Section 2:44 of the new Civil Code undoubtedly expressed the possibility of establishing the public interest in court in the event of abuse of the right to freedom of expression and the press in a stricter, more unyielding and more fortunate manner than the provision finally adopted.

[89] Under the original proposal it was laid down that

[90] “The protection of the right to privacy of a politically exposed person must not unnecessarily restrict the fundamental rights to the freedom to debate public affairs”. The use of the word “unnecessarily” in this wording allows courts to take into account the public interest in all the circumstances of the case.

[91] However, this possibility should not have been withdrawn from the legislator if the term “legitimate ground of public interest” had been used, in particular in the case of an Act of Parliament which had not yet entered into force. Judicial practice would be able, with the aid of Article 28 of the Fundamental Law, to develop a judicial practice

that ensures the legislative purpose of the said provision, the prevention and deterrence of the abuse of the right to freedom of speech and the press in the public interest.

Budapest, 3 March 2014

Dr. Egon Dienes-Oehm, sgd.,
Justice

JUHÁSZ, J., dissenting:

[92] I do not agree with the substance of the Decision.

[93] 1. One of the cornerstones of the majority opinion is that in the case of the protection of the personal rights of politically exposed persons, the focus of constitutional protection is on the opinions expressed during the debate of public affairs and not on the human dignity of the persons concerned. I cannot agree with this statement. On the one hand, the legislative reasoning attached to Section 2:44 of the new Civil Code itself states that during the codification the National Assembly merely raised the rule on the lower protection of the personal rights of politically exposed persons, already developed by judicial practice, to a level of an Act of Parliament. It cannot be said, therefore, that the legislator has deviated from the practice of law enforcement, which is also determined by the practice of the Constitutional Court, during the re-regulation of the right to personality.

[94] In addition, I believe that the new Civil Code, in accordance with the Fundamental Law, renders human dignity the ultimate restriction on freedom of expression. The decision rightly refers to Article I (3) of the Fundamental Law, according to which the (detailed) rules concerning fundamental rights are laid down by an Act of Parliament; however, a fundamental right may be restricted only if it is unavoidable in order to protect the exercise of another fundamental right (or constitutional value), but even then only to the extent necessary and proportionate to the purported objective. The majority opinion also seeks to resolve the conflict between human dignity and freedom of expression on this basis, but the conclusion drawn from Article I (3) of the Fundamental Law regarding the determination of the boundary of the restriction is not correct. Under the majority opinion, the right to the protection of human dignity is unrestricted only as a legal determinant of human status. This is the adoption of the constitutional court interpretation of the right to human dignity, under which the right to human dignity means that there is a core of individual autonomy, self-determination, extracted from everyone else's disposal, by which man remains subject and cannot become an instrument or an object. In my view, freedom of expression must not

penetrate into human dignity at the depth set by the majority opinion, even on account of the higher threshold of tolerance for public figures. The majority opinion goes far beyond what is still absolutely necessary to ensure freedom of expression and thus allows human dignity to be violated to such an extent that I believe it is unnecessary and disproportionate. It is true, then, that politically exposed persons can be subject to stronger criticism for their statements and behaviour in this capacity, but, in my view, it is not human dignity that should bow to freedom of expression, but vice versa. This choice of value was expressed by a shift from the "legitimate ground of public interest" annulled by the majority decision.

[95] Given that the annulled provision of the new Civil Code already codified judicial practice, I do not agree with the view that it would have been incomprehensible to those applying the law, and this implicitly presupposes that the courts would have been incapable of replenishing it with substance. I therefore believe that what the majority opinion sees as a restriction on the right to freedom of expression is, in fact, a guarantee of the exercise of the right to human dignity of politically exposed persons.

[96] 2. Nor can it be ignored that the decisions of the Constitutional Court relied on by the majority opinion essentially preserve a situation crystallised more than 20 years ago. Reflecting on freedom of expression, the landmark Decision [Decision 30/1992 (V. 26.) AB, ABH 1992, 167., hereinafter referred to as the "1992 Court Decision"], which is also widely cited by the majority opinion, states that it is a product of a specific historical age, the change of regime; however, it also states that "[t]he Constitutional Court takes note of the historical circumstances of individual cases". On the other hand, since the adoption of the 1992 Decision, not only historical circumstances have changed significantly, but also the medium of expression. I am thinking here primarily of the Internet as a new medium that has significantly rearranged the world of the written press and given new, unprecedented freedom to express opinions (essentially almost without limits).

[97] I am convinced that, for reasons of both the historical dimension and technical progress, it is necessary to reconsider whether and to what extent previous Constitutional Court rulings on freedom of opinion and the press are applicable today. I would also point out in this connection that, in my opinion, the reference to some of the cited decisions of the Constitutional Court is unnecessary (and in some places confusing) and, on the other hand, the manner of reference does not fully comply with what was held in Decision 13/2013 (VI. 17.) AB. In this respect, the majority opinion essentially negates Article R (3) of the Fundamental Law, according to which the provisions of the Fundamental Law must be interpreted in accordance with their purpose, the National Avowal and the acquis of our historical constitution.

[98] 3. Finally, it should be mentioned that Hungarian law to this day is still wanting in the exact definition of a politically exposed person (or public figure). In the practice of the Constitutional Court, a politically exposed is primarily a person exercising public power or a public figure politician or other public figure [first held in Decision 36/1994 (VI. 24.) AB, ABH 1994, 219.]. (The definition of a more precise scope of subjects was left to those applying the law by the Constitutional Court.)

[99] At the legal level, the concept appears partly contradictory or in only a few sources of law, such as Act III of 2003 on the Disclosure of the Secret Service Activities of the Communist Regime and on the Establishment of the Historical Archives of the Hungarian State Security. According to the interpretative provisions of the Act, a public figure is a person who exercises or has exercised public power, has been nominated for a position of or involves the exercise of public power, or who shapes or has shaped the political public opinion as a matter of professional responsibility.

[100] Interpreting the above, it can be stated without a doubt that those exercising public power, (public figure) politicians, are clearly considered to be public figures, whereas the circle of other public figures becomes blurred along the contours. However, public participation goes beyond political engagement, anyone who addresses a public issue can become a "public figure" (I am thinking here of participation such as blog posting on the Internet or posting on forums).

[101] Nor does the majority opinion differentiate between individual public performances according to their purpose. This is important because, in my opinion, not all public participation is considered to concern public life, at least not in the sense that the majority opinion assumes that it serves to shape democratic public opinion and to discuss public affairs. Does an action in a talent search program or a poem performed in front of the general public, for example, qualify as a public performance, a discussion of public affairs, or the formation of a democratic public opinion? The decision is inconsistent in the above issue and sometimes speaks of politically exposed persons and sometimes of public officials or politicians, that is, it identifies public appearance with political involvement. This is problematic in addition to the above, because *ab ovo* presupposes that participation in public life is a voluntary, self-determined action aimed at debating and actively shaping public affairs. In my view, it was the turn of the "legitimate ground of public interest" that was annulled by the new Section 2:44 of the Civil Code that would have given law enforcers the freedom to decide whether public participation in a given case is in the public interest, that is, whether it qualifies as an active action aimed at discussing public affairs and shaping democratic public opinion.

Budapest, 3 March 2014

Dr. Imre Juhász, sgd.,
Justice

LENKOVICS, J., dissenting:

[102] I cannot agree with the operative part of the decision for a number of reasons, and I consider the Reasoning to be unilateral and incomplete.

[103] 1. The operative part of the decision and its Rationale are based on the dogmatics of freedom of expression and opinion (indirectly freedom of the press and media) developed in the 19th and 20th centuries, mainly in the last half century, and enshrined in the previous practice of the Constitutional Court. The essence of this is that freedom of expression must be protected most strictly against the State in order to form democratic public opinion and freely debate public affairs. This position is invariably correct in itself, but at the same time the law (legislation, application of law and interpretation of law) must keep pace with social (economic, technical, etc.) development, with a significant change in circumstances; thus, the actual transformation of power relations and living conditions cannot be ignored, either. In the world of the press and media, there has been a large concentration of ownership and economic power at national, regional and global levels, oversized profit-making economic institutions are able to wield rather significant influence, not public but private power, sometimes domination not only over individual people, society, but sometimes also over State public power. Associated with this and closely related to it is the system of information and communication technical conditions for speaking and expressing opinions, and its enormous influence on the individual and the private sphere. In the context of the circumstances that have changed significantly for these reasons, the social (democratic, civil movement, data protection, child protection, etc.) demand is growing that freedom of expression and opinion should be protected by the State as a public authority against the influence and domination of the press and media.

[104] 2. In the United States, a movement was launched to legally dismantle the five largest media monopolies (by analogy with nineteenth-century anti-trust legislation). As a restriction on editorial freedom, it is becoming increasingly common to impose a legal obligation to place cultural and local public service TV channels free of charge in the "packages" of cable operators. In Germany, a press union launched a nationwide campaign against "dumbing down" certain TV shows. The growing range, global size

and gravity of Internet violations, the possibility of anonymous violations, and the lack of cessation and remediation of violations are of growing concern. In a consumer society, the "media consumer" also needs to be protected, and the inviolability of human dignity precludes public figures from being degraded into objects ("products") in the media market.

[105] Due to the foregoing and other similar phenomena, there is a growing expectation towards law that freedom of speech and expression should not be distorted into licentiousness or reversed. It is becoming increasingly clear that the right to freedom of expression is not an unlimited right, and it is, similarly to any other right, limited by other fundamental freedoms, constitutional rights and values, and the dignity and rights of others. It means the same in other words that, like the exercise of all fundamental freedoms and rights, freedom of expression and opinion is a responsibility, it can only be exercised with responsibility.

[106] 3. Section 2:44 of the new Civil Code tried to meet the "old" constitutional requirements related to the freedom of expression and opinion together with the substantially changed "new" circumstances. The wording of this rule fully reflects the main title of Part Three of the Fundamental Law, the "catalogue" of fundamental rights, "FREEDOM AND RESPONSIBILITY", which also covers Article IX (1), namely, freedom of expression. It is also in line with the principle requirement of the new Section 1:2 (1) of the Civil Code, pursuant to which "The provisions of this Act shall be interpreted in accordance with the constitutional order of Hungary." The first sentence of Article 28 of the Fundamental Law also forms a bridge between the Fundamental Law and the new Civil Code as follows: "In the course of the application of law, courts shall interpret the text of laws primarily in accordance with their purpose and with the Fundamental Law."

[107] The wording of Section 2:44 of the new Civil Code, including the annulled "on a legitimate ground of public interest" part of the normative text, fully complies with the current constitutional order of Hungary, the combined requirement of freedom and responsibility, the principle of "constitutional civil law" of the new Civil Code, and the changed circumstances of the 21st century.

[108] 4. The wording of the provision at issue is in fact an open general clause which, on a case-by-case basis, entrusts the judge with the line between freedom of expression and the rights of the individual based on human dignity and the protection of fundamental rights and, on the other hand, the comparison of two individual rights of personality [Section 2:42 (1) and (2) of the Civil Code] as well as the adjudication of

their conflict. The abstract legal provisions included in the text of Section 2:44 express more than twenty years of "unbroken" constitutional court practice (public interest, measure of necessity and proportionality, inviolability of human dignity) as well as the expectation of the new Fundamental Law reinforcing the responsibility associated with freedom. One may go as far as to establish that the text of the new Civil Code implements the rewriting of constitutional requirements into private law. The annulled part of the normative text sends a message to all free speakers that neither personal self-interest nor pretended public interest, including the personality of politically exposed persons, can be infringed. Such an infringement cannot be legitimate, that is, it cannot be justified either legally or morally.

[109] 5. The abstract text of the new Civil Code, which will enter into force on 15 March 2014, will be rendered more specific and manifest through case-by-case court judgements, that is, it will become "living law". This Decision does not give judicial practice the possibility to apply the new law in a constitutionally compliant manner. In fact, it is not only criticising the legislature, but also the third branch of power, the judiciary, without even a single unconstitutional court judgement. Even if this happens, it can be reviewed by the Constitutional Court following a constitutional complaint. The forward-looking position that the annulled text would result in unconstitutional judgements is nothing more than an irrebuttable presumption (possibly fiction) that does not give the courts a chance to apply the correct, that is, constitutional, civil law.

[110] 6. I further note that since the terms "public affairs" and "public life" are included in the text of the law, the statutory expectation of the "public interest" is obvious by linking them to the "necessary" condition. An infringing opinion expressed in the public interest, if proportionate, can also be appreciated, provided that it does not violate human dignity. That is, despite the annulled part of the normative text, the "legitimate ground of public interest" remains a condition in the text of the law in terms of content and on its merits, and judicial practice may require it on a case-by-case basis. I therefore consider the annulment to be superfluous in substance as well.

Budapest, 3 March 2014

Dr. Barnabás Lenkovics, sgd.,
Justice

POKOL, J., dissenting:

[111] I cannot accept either the annulment in the operative part by the majority opinion or the individual points of the Reasoning.

[112] 1. In my view, the stronger protection of the rule in the Civil Code challenged by the petition towards public figures, by considering public speeches that violate their rights to privacy as rightful only on a legitimate ground of public interest, is acceptable. And the legitimate suggestion that the lack of contour and normative openness of the "legitimate public interest" can cause legal uncertainty is not yet a ground for annulment, because the Constitutional Court could have already started to show how this openness can be reduced with more concrete content, and thereby put subsequent application of the law on a more secure footing. Instead of annulment on the grounds of normative openness and uncertainty, it would have been more appropriate for the decision to restrict the openness of the "legitimate public interest" by imposing a constitutional requirement on the application of the law by the judiciary by defining the intensity of public speaking in public affairs. It is on a legitimate ground of public interest to be spoken of when it is related to the issues of a public matter, and the more intense, or closer, this connection is, the more legitimacy will become a precondition. Prescribing the constitutional requirement with such content would have solved the problem raised in the petition without annulling the statutory provision at issue.

[113] 2. Nor can I agree with paragraphs [25] to [33] of the Reasoning, where the majority opinion based our Decision not only on the human rights convention but also on the practice of the European Court of Human Rights (hereinafter referred to as the "Human Rights Court"). The relevant decisions of the Human Rights Court may play a useful role in our draft decisions as information in the decision-making process of the Constitutional Court for internal use as *pro domo*, but in my view, they should not be included in the final decision, at most in individual concurring reasoning and dissenting opinions as further arguments of individual constitutional judge positions. The reference in the decision of the Constitutional Court means that, in addition to the Fundamental Law, we attribute normative binding force not only to the Convention, but also to the judicial practice interpreting it, and thereby acknowledging that the Human Rights Court may rewrite international standards binding on them without the involvement of States Parties.

[114] The binding nature of the case law of the Human Rights Court on Hungarian Justices of the Constitutional Court should not be accepted either, because, as a matter of principle, it arises against the often criticised broad interpretation of the Human Rights Court, which goes beyond the text of the Convention in some cases, to take action against it, citing the inviolable core of the Hungarian constitutional system. The

former majority in the Constitutional Court dealt with the doctrine known as the constitutional identity established by the German constitutional justices in connection with the control of the Lisbon Treaty, but did not wish to transfer it to the domestic constitutional justice (*see* the first paragraph of Part III of the Reasoning for Decision 143/2010 (VII. 14.) AB). However, the Fundamental Law, which has since entered into force, obliges the majority of today's constitutional justices to reconsider the position at that time by placing the national community and national sovereignty under stronger protection. The German constitutional justices in 2009, in their Lisbon judgement, already developed a theoretical construct that allowed a country to take action against an interpretation of the convention given by a court of a multilateral international convention on the grounds of the inviolability of constitutional identity and to prohibit the domestic application of such an interpretation. Although the German constitutional justices formulated this doctrine of constitutional justice primarily against acts of the European Union which affect the Member States, the essential findings of this apply to all multilateral conventions if they waive their sovereignty over the sovereignty of that country and a court of an international organization is adjudicating on the norms of the country's constitution. In the present case, the Hungarian State has submitted to the Convention on Human Rights, to waive its immunity under its sovereignty, to lodge an individual complaint against it, and to enforce a judgement of the Human Rights Court if it has violated the norms of the Convention. However, this subordination can only last as long as the Human Rights Court adheres strictly to the norms of the Convention, because if it breaks away from it, it imposes an obligation on the Hungarian State to which it did not submit and which violates the essential essence of our Fundamental Law based on Hungarian sovereignty. A broad interpretation of Article 23 of the Constitutional Court Act, which entitles the Constitutional Court to review the compliance of international treaties with the Fundamental Law before concluding international treaties, allows for reviewing a decision of the Human Rights Court concerning the Hungarian State, whether or not it exceeded the norms of the Convention to which the Hungarian State submitted, and whether or not its implementation would violate the inviolable core of domestic constitutionality, and thus our constitutional identity. In the light of this option in principle, I also oppose the citation in our decisions suggesting the binding nature of the Human Rights Court's practice and the reasoning of our decisions based on it.

Budapest, 3 March 2014

Dr. Béla Pokol, sgd.,
Justice

SALAMON, J., dissenting:

[115] I do not agree with the Decision.

[116] In my view, the wording of Section 2:44 of Act V of 2013 on the Civil Code the term "on a legitimate ground of public interest" is not in conflict with the provisions of Article IX of the Fundamental Law declaring freedom of the press and expression.

[117] The fundamental rights referred to above are not unlimited. Since the unrestricted exercise of the right to freedom of the press and freedom of expression would make it possible to infringe other fundamental rights, such as the right to human dignity, the inviolability of private and family life and the right to reputation, their limitation can also be deduced from Article I (3) of the Fundamental Law, as recognised by the practice of the Constitutional Court.

[118] As a consequence of the fourth amendment to the Fundamental Law, Article IX, referred to in the petition, has itself enshrined human dignity as a value to be protected in paragraph 4 since 1 April 2013 as an explicit limit to expression.

[119] In my view, the increased obligation of tolerance and criticism of politically exposed persons, also confirmed by the Constitutional Court, cannot be interpreted so broadly that would make it possible and constitutionally justifiable that, in the context of the free debate on public affairs, the privacy rights of politically exposed persons should not enjoy the same protection as others without justifying the public interest.

[120] It follows from the above that there is no constitutional objection to the contested provision of the new Civil Code, which adequately reflects the development of information technology and the practice of mass communication today. In accordance with the positive legal provisions of the Fundamental Law, the regulation which also accepts the exercise of fundamental rights ensuring the free dispute of public affairs as a limit to the protection of the rights of politically exposed persons only if it is on a legitimate ground of public interest.

[121] I do not agree with the findings of the decision that the above-mentioned "legitimate ground of public interest" clause is an unconstitutionally justifiable additional condition. The decision itself acknowledges that the free shaping of public affairs by all, including the right to express opinions on it, constitutes the emergence of a public interest in terms of the wider criticism of public figures than others. It follows that the *expressis verbis* appearance of the concept of the public interest in a regulation restricting the personal rights of public figures cannot in fact have a restrictive effect on freedom of expression. Therefore, the annulment of a provision to that effect is not justified.

[122] With regard to the contested provision of the new Civil Code, no objection to constitutionality could be raised with regard to the adjective "legitimate" at most, due

to its indefinite normative content, which can only be determined on a case-by-case basis. In my view, for that reason, there could be concerns about Article B (1) of the Fundamental Law on the rule of law; however, questions of interpretation in that regard are presumably to be dealt with properly in the course of the application of the law.

[123] As the courts are bound by Article 28 of the Fundamental Law in their judicial activity, pursuant to which legislation must be interpreted in accordance with its purpose and the Fundamental Law, in the course of the application of law, it is possible to enforce the constitutional requirements and aspects summarised in the Decision, almost with scientific rigour, as well as the achievements of the two decades of practice of the Constitutional Court (and ordinary courts acting in such cases) and to fill the said legal framework with the correct content. In my view, therefore, it is unreasonable to question the possibility of constitutional application from the outset with regard to a legal provision that has not yet entered into force and has not even provided experience in its application.

[124] In view of the fact that the section on international practice is specifically mentioned in the Decision, that a politically exposed person may not only be a politician, we need to understand a much wider range of people from both the public and private sectors in relation to certain aspects of their activities (e.g. members of the judiciary, senior civil servants, but also, where appropriate, artists, media figures, etc.). As explained in the Decision, not all members of the scope of persons concerned have the same means to prevent attacks on their person, which may be unfounded or unworthy, and to use different communication channels to respond to them. The differentiation of the relevant group of persons provides well-founded arguments that the most important aspects and limitations of judicial discretion in connection with the enforcement of fundamental rights protected by the Fundamental Law should be laid down in an Act of Parliament.

[125] In my view, the annulled normative text does not contain any unmanageable difficulties of interpretation or a real constitutional problem compared to the considerations set out in the Decision; therefore, the annulment of the relevant part of the Act is not justified.

Budapest, 3 March 2014

Dr. László Salamon, sgd.,
Justice