

Decision 3328/2017. (XII. 8.) AB
on rejecting a constitutional complaint

In the subject-matter of a constitutional complaint, the plenary session of the Constitutional Court has adopted the following

decision:

The Constitutional Court rejects the petition aimed at establishing a conflict with the Fundamental Law and annulling the ruling No. Bfv.I.1222/2013/4 of the Curia.

Reasoning

I

[1] 1 The petitioner (Béla Barkóczy) submitted a constitutional complaint through his legal representative (Dr. Szabolcs Miklós Sánta, 35 Wesselényi u. I/1, 1077 Budapest) pursuant to section 27 of the Act CLI of 2011 on the Constitutional Court (hereinafter: ACC), which was mailed on 28 May 2014, addressed to the Siófok District Court.

[2] As a background to the case, the petitioner submitted that proceedings had been brought against him at the Siófok District Court on the basis of a complaint by a private prosecutor for two counts of the offence of defamation in public, committed with malicious motive, in breach of section 179 (1) of the Act IV of 1978 (hereinafter: "old Criminal Code") and qualifying under paragraph (2) (a) and (b) of that Act.

[3] According to the facts of the case as established by the court of first instance, the accused and the victim (the private prosecutor), the latter being the incumbent mayor of the municipality at the time of the offence, stood as candidates for mayor in the 2010 municipal elections. During the election campaign, on 28 September 2010, the accused published and distributed to the inhabitants of the municipality an election leaflet in which, under the subheading "2008 – the year of scandals!", the following was written:

"Firewood theft

In 2008, the mayor shortened the forests of more than 100 owners by nearly 100 m³ of wood without permission. He illegally stole about 40 m³ of firewood from the property of the village entrusted to him. [Name of mayor] got lost, he said in his defence. Would you, respected inhabitants of [name of municipality], not take offence at such a childish defence?

The forestry authority imposed a fine of HUF 2.7 million, despite the fact that [name of mayor] had accepted all financial responsibility and later left the fined employee alone. It is worth knowing how long his friendship would last.

Funeral parlour

The funeral parlour was renovated in 2008 with 7.5 million in state subsidies and with an own share of 1.6 million. It's a nice building. I also like it. The building is a credit to the designers and builders.

Public workers from [municipality name] also worked on the construction. The municipality did not charge for the work carried out, nor did it charge for the bricks built in and owned by the municipality. Amounts of hundreds of thousands left in the construction budget were collected by third parties, including for work not carried out."

[4] The Siófok District Court acquitted the petitioner of the charges against him by its judgement No. 2.B.548/2010/22 of 25 November 2011.

[5] The Kaposvár Regional Court, acting on second instance, by its ruling No. 1.Bf.969/2011/6 of 21 March 2012, set aside the judgement of the first instance court and ordered the first instance court to conduct a new trial, stating that the taking of evidence regarding the veracity of the facts capable of defamation must be supplemented.

[6] In the retrial, the Siófok District Court, by its judgement No. 4.B.113/2012/14 of 30 October 2012, found the petitioner guilty of the offence of defamation under section 179 (1) of the old Criminal Code qualified under paragraph (2) (a) and (b), and therefore sentenced him to a fine of HUF 250,000.

[7] In its ruling No. 1.Bf.615/2012/8, which became final on 13 February 2013, the Kaposvár Regional Court upheld the judgement of the court of first instance.

[8] The Curia, by its ruling Bfv.I.1222/2013/4 of 10 March 2014, rejected the petition for review against the final judgement and upheld the decisions of the first and second instance courts.

[9] The petitioner lodged a constitutional complaint with the Constitutional Court against the ruling No. Bfv.I.1222/2013/4, of the Curia, the ruling No. 1.Bf.615/2012/8 of

the Kaposvár Regional Court and the judgement No. 4.B.113/2012/14 of the Siófok District Court.

[10] 2 The petitioner claims that the contested court decisions infringe the freedom of expression enshrined in Article IX (1) of the Fundamental Law by holding him criminally liable for defamation for malicious purposes on the basis of statements he made in an election campaign concerning local public affairs, the truthfulness of which he could not prove beyond reasonable doubt.

[11] The petitioner referred to the decisions of the Constitutional Court which, in his view, are relevant to the case in the light of Article IX (1) of the Fundamental Law [Decision 36/1994. (VI.24.) AB (hereinafter: CCDec1), Decision 57/2001. (XII.5.) AB, Decision 7/2014. (III.7.) AB (hereinafter: CCDec3), Decision 13/2014. (IV.18.) AB (hereinafter: CCDec4)]. The petitioner considered that, although the contested ruling of the Curia and the final judgement were issued prior to CCDec4, the principles set out therein should be considered to be applicable to the contested court decisions, as they could be deduced from the case-law of the Constitutional Court at the time of taking the court decisions. The petitioner also referred to the relevant case-law of the European Court of Human Rights (ECtHR).

[12] The petitioner explained that the Constitutional Court had in several decisions laid down a heightened duty of tolerance on the part of public authorities towards criticism of their activities [CCDec1, Decision 57/2001. (XII.5.) AB]. In this context, he referred to the set of constitutional criteria (test) laid down in CCDec4, which can be used to assess which communications are in line with the provisions of the Fundamental Law. The petitioner stressed that the statements for which he was convicted were made during the 2010 municipal election campaign, where he and the private prosecutor had undertaken public appearances. The criticisms in the election leaflet were not of the mayor's private life but of his official capacity, and their style was free from any vilification and therefore fell within the scope of the protection of expression in public affairs requiring a higher degree of tolerance.

[13] A further element of the test in the CCDec4 is to determine whether the communication constitutes a value judgement or a statement of fact. The court considered the petitioner's statement of opinion to be a statement of fact and ordered proof of its truth. In the petitioner's view, the burden of proving the level of certainty required by the Curia in proving the truth was disproportionate for him as a private individual. The reversal of the burden of proof places the same burden on the private individual as on the prosecutor, which is disproportionate to the private individual. The consequence of this disproportionality, the petitioner failed to adequately prove the veracity of his allegations. However, the petitioner claimed that the information on

which the statements were based was "not hearsay but official documents" and that his allegations could not therefore be considered unsubstantiated.

[14] The petition referred to the fact that the ruling of the Curia followed the judicial case-law according to which, if the court is not convinced as to the factual reality of the alleged (rumoured) fact, the criminal liability of the perpetrator shall be established. The risk of failure of proof and the expected legal consequences are likely to discourage the person who wishes to express his or her opinion.

[15] The petitioner also referred to the constitutional requirement formulated in CCDec1, according to which, in his interpretation, the perpetrator can only be punished for defamation if he was aware of the falsity of the alleged fact. In the underlying case, the petitioner defended himself on the ground that he was mistaken in believing that the facts he had alleged were true.

[16] The petitioner holds that the courts in his case misapplied the above principles and requirements laid down by the Constitutional Court. As a consequence, his complaint sought not only a declaration that the challenged court decisions were in violation of the Fundamental Law, but also the "clarification of the constitutional conditions to be met by the proof of veracity that may be ordered in proceedings related to defamation, where the communication concerns public matters."

[17] In view of the above, the petitioner sought a declaration that the contested court decisions were contrary to the Fundamental Law and their annulment on the ground of the infringement of the right to freedom of expression under Article IX (1) of the Fundamental Law.

[18] The petitioner further submitted that the final judgement also infringed his right to a fair hearing under Article XXVIII (1) and his right to defence under Article XXVIII (3) of the Fundamental Law. He based these breaches on errors and deficiencies in the taking of evidence in the court proceedings at first instance. He complained that, in the course of proving the veracity of the facts, the courts had not approved to carrying out the acts of taking evidence he had proposed, had not examined the evidence he had adduced and had not included in the reasoning of the decisions the assessment of the evidence taken into account. In the light of the above, the petitioner also sought a declaration that the contested court decisions were contrary to the Fundamental Law and their annulment on the grounds of infringement of his rights to a fair trial under Article XXVIII (1) and his rights of defence under Article XXVIII (3) of the Fundamental Law.

[19] 3 The Constitutional Court requested the Minister of Justice to explain his position on the regulation of the legal instrument of proving veracity in cases of defamation. In the opinion of the Minister of Justice, it can be concluded that the constitutional

requirement laid down in CCdec1 is complied with in the judicial case-law. However, it is also noticeable that the doctrine of criminal law and the constitutional requirement laid down in CCDec1 are not fully compatible with each other. The judicial case-law has resolved this discrepancy by examining the conditions of the constitutional requirement specified in CCDec1 in the context of the unlawfulness of the offence. The legal instrument of the proof of veracity and the established judicial case-law developed with regard to the constitutional requirement laid down in CCDec1 provide an appropriate framework for the courts to resolve the conflict between constitutional values in the exercise of their discretion in specific cases in accordance with the Fundamental Law.

II

[20] In its proceedings, the Constitutional Court took into account the following statutory provisions.

[21] 1 The provisions of the Fundamental Law referred to in the constitutional complaint:

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

"Article XXVIII (1) Everyone shall have the right to have any indictment brought against him or her, or his or her rights and obligations in any court action, adjudicated within a reasonable time in a fair and public trial by an independent and impartial court established by an Act.

[...]

(3) Persons subject to criminal proceedings shall have the right to defence at all stages of the procedure."

[22] 2 The relevant provisions of the old Criminal Code:

"Defamation

"Section 179 para. (1) Anyone who in front of another person states or disseminates a fact capable of offending the honour of another person, or uses an expression directly referring to such a fact, commits an offence and is to be punished by imprisonment for up to one year.

(2) The punishment shall be imprisonment for up to two years, if defamation has been committed

(a) for a base reason or purpose,

(b) in front of a large public,

(c) in a manner causing considerable injury to interests.”

“Proof of veracity

Section 182 (1) For the offences specified in section 179 [...], the perpetrator shall not be punished if the fact capable of degrading honour proves to be true.

The proving of veracity is only allowed if the stating of the fact, the spreading of the rumour or the use of an expression directly referring to such a fact is justified by public interest or anyone’s lawful interest.”

III

[23] 1 In accordance with section 56 (1) of the ACC, the Constitutional Court conducted the procedure for the admission of the petition before examining the merits of the petition. As a result of the procedure, the Constitutional Court concluded that the petition as a whole meets the requirements for admissibility set out in the ACC, therefore it decided on the admission of the petition on 1 June 2015.

In the admission procedure, the Constitutional Court considered it a question of fundamental constitutional importance whether, in view of the criminal proceedings against the petitioner, the judicial case-law in the context of the proof of veracity and the application of the consequences thereof complies with the criteria arising from the provisions of the Fundamental Law, primarily Article IX (1), and the related case-law of the Constitutional Court.

[24] 2 The Constitutional Court did not examine the merits of the petitioner's objections seeking the annulment of the final judgement on the grounds of violation of the right to a fair trial guaranteed by Article XXVIII (1) of the Fundamental Law and the right to defence under Article XXVIII (3) of the Fundamental Law. In relation to these elements of the petition, the petition does not contain any constitutionally valuable reasoning as to why the challenged judgements are contrary to the two indicated provisions of the Fundamental Law. Given that there was no room for an examination of the merits of these elements of the petition, the Constitutional Court dismissed the constitutional complaint in this part on the basis of section 64 (d) of the ACC.

IV

[25] The petition is unfounded according to the following.

[26] According to the petitioner's objection, in the criminal proceedings carried out against him, the courts did not apply the constitutional criteria established by the Constitutional Court in the context of the expression of opinion in public affairs. The result, in his view, was that the burden of the failure to prove the truth fell on the petitioner and the courts found him criminally liable for defamation.

[27] 1 In examining the petition, the Constitutional Court provided an overview of its case-law in the context of the constitutional limits of freedom of expression and the requirements that may be set for the judiciary in cases of prosecution for defamation. In this context, the Constitutional Court also took into account the substantive and procedural criminal law provisions in force and the judicial case-law applied.

[28] 1.1 The constitutional conditions for the exercise of the right to freedom of expression were already addressed by the Constitutional Court in a number of decisions before the entry into force of the Fundamental Law [See for example: Decision 48/1990. (IX.26.) AB, Decision 30/1992. (V.20.) AB, Decision 37/1992. (VI.10.) AB, Decision 4/1993. (II. 12.) AB, CCDec1, Decision 33/1998. (VI.25.) AB, Decision 12/1999. (V.21.) AB, Decision 18/2000. (VI.6.) AB, Decision 34/2004. (IX.28.), hereinafter: CCDec2, Decision 6/2007. (II.27.) AB, Decision 34/2009. (III.27.) AB, Decision 165/2011. (XII. 20.) AB].

[29] In CCDec1, the Constitutional Court, examining the matter in the context of criminal law, held for the first time that the scope of constitutionally protected expression of opinion is broader in relation to persons exercising public authority and politicians in public office than in relation to other persons. In the decision, it therefore annulled section 232 of the old Criminal Code, which contained the statutory offence of insulting an authority or official. Furthermore, in the context of the statutory offences of defamation and insult, it established as a constitutional requirement that "the scope of expression of opinion, which is constitutionally protected by the right to freedom of expression and therefore not punishable, should be broader than for other persons, in relation to expression of opinion about persons and institutions exercising public authority and politicians in public office. An expression of a value judgement capable of offending the honour of an authority, an official person or a politician acting in public, and expressed with regard to his or her public capacity is not punishable under the Constitution; and an expression directly referring to such a fact is only punishable if the person who states a fact or spreads a rumour capable of offending one's honour or uses an expression directly referring to such a fact, knew the essence of his or her statement to be false or did not know about its falseness because of his or her failure to pay attention or exercise caution reasonably expected of him/her pursuant to the rules applicable to his or her profession or occupation, taking into account the subject matter, the medium and the addressee of the expression in question" (CCDec1, ABH 1994, 219).

[30] 1.2 Item 5 of the Final and Miscellaneous Provisions of the Fundamental Law established the expiry of previous Constitutional Court decisions taken before the entry into force of the Fundamental Law. Therefore, the Constitutional Court, based on the criteria set out in paragraphs [26] to [34] of the Reasoning of the Decision 13/2013 (VI.17.) AB, in CCDec3 and CCDec4, reviewed its previous case-law on the right to freedom of expression in the exercise of public affairs and laid down the main principles to be applied in this context.

[31] In CCDec3, the Constitutional Court compared the provisions of the Constitution and the Fundamental Law relating to freedom of expression and freedom of the press. Based on the conducted review, the Constitutional Court established that "the Fundamental Law reinforced the interpretation, developed in the Constitutional Court's case-law, that the freedom of speech and the freedom of the press have a twofold justification, i.e. they are equally important with regard to both the individual self-expression and the democratic operation of the political community. Reinforcing this twofold justification in the Fundamental Law means that the former interpretation about the special place of the freedom of speech among the fundamental rights shall remain valid" (CCDec3., Reasoning [23]). The Constitutional Court also added: "the applicability of the arguments concerning the interpretation of freedom of expression [...] is not undermined even by the fact that the wording of Article IX of the Fundamental Law shows further differences compared to the previous constitution's text on freedom of expression, and among these differences, Article IX (4) explicitly falls within the scope of the protection of personality. According to the provision, which entered into force by the fourth amendment of the Fundamental Law, exercising the right to 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 has been that the human dignity of others can be a limit to freedom of expression" (CCDec3., Reasoning [24]).

[32] The Constitutional Court has maintained the general principle, present in its case-law since CCDec1, that freedom of expression is more broadly enforced in certain cases and imposed a higher duty of tolerance on those affected by such opinions. In the context of defining these cases, the Constitutional Court stressed in CCDec3 that the decisive factor is not the personal, public character of the persons affected by the expression of the opinion. The scope of the expression of an opinion is broader when the communication containing the opinion concerns a dispute on public matters. Accordingly, "with regard to the expression of opinions in the scope of debating public affairs and the assessment of the applicable protection, the primary issue at focus is not the status of the affected persons, but the fact that the expressing party uttered his views concerning a social, political issue. (CCDec3., Reasoning [47]).

[33] According to the case-law of the Constitutional Court – following the adoption of CCDec3 – the primary basis for the enhanced protection of the expression of opinion is therefore that the opinion was expressed in any way as part of the public debate in the course of the discussion of public affairs. And in the event that it can be established that the communication under examination is related to the discussion of public affairs, regardless of whether the person concerned is a person exercising public authority or a person of another status, he or she is subject to a higher than normal duty of tolerance under Article IX (1) of the Fundamental Law in respect of criticism or disapproval of him or her.

[34] 1.3 In CCDec4, the Constitutional Court continued to elaborate the criteria for freedom of expression and to review the principles set out in previous decisions. Prior to CCDec4, the Constitutional Court had formulated these principles predominantly in procedures of the norm control type, i.e. in proceedings examining the conflict with the Constitution or the Fundamental Law of a provision of the law. It was in the CCDec4 that it applied for the first time the criteria formulated in its case-law in the review of the constitutionality of a judicial decision. In defining these criteria, the Constitutional Court explicitly drew on the case-law of international legal protection mechanisms, in particular the ECtHR.

[35] In CCDec4, in line with its findings made in CCDec3, the Constitutional Court stated that “in assessing a public communication, it is necessary to decide first of all whether the communication in question reflects the expression of a view on public affairs, a position expressed in a public debate, that is to say, whether it is in the context of the free discussion of public affairs” (CCDec4, Reasoning [39]).

[36] The Constitutional Court did not intend to provide a definition of public affairs, leaving it to the courts to determine whether the communication in question reflected the expression of a view on public affairs or a position taken in a public debate. The Constitutional Court has merely provided the criteria for judicial discretion. Accordingly, “the primary aspects to be considered are the manner of presenting the communication, its circumstances as well as the subject and the context of the opinion. Thus, the communication should be examined in terms of the type of medium, the event that gave rise to the communication, the reactions to it and the role played by the relevant communication in this process. Other aspects to be assessed include the content and style of the communication as well as its timeliness and purpose. If it can be established by the evaluation of the circumstances that the communication affects the free debating of public affairs, it shall automatically enjoy a higher level of protection granted by the freedom of expression. Such a communication is one of the main guarantees of the control and controllability of public authority and those exercising public power, which is an indispensable requirement for the democratic and

open functioning of a society based on pluralistic foundations" (CCDec4, Reasoning [39]).

[37] The Constitutional Court has also held that if the court finds that the communication was made in a public matter, it needs then to decide whether the communication can be regarded as a value judgement or a statement of fact. (CCDec4, Reasoning [40]).

[38] In this respect, the Constitutional Court did not intend to limit the discretion of the courts by defining the detailed conceptual elements of a value judgement or a statement of fact, but merely stated that "unlike value judgements, statements of facts always contain concrete facts, the reality of which can be verified and checked by means of taking evidence" (CCDec4, Reasoning [41]).

[39] The Constitutional Court has also defined the limits of permissible tolerance with regard to value judgements and statements of facts. According to this, "freedom of expression shall not defend an opinion expressed even in a public debate, if the views expressed therein violate the inalienable core of human dignity and thus amount to a manifest and serious denigration of human status. [...] Accordingly, the freedom of expression regarding public affairs provides unlimited protection concerning true facts, but the protection granted with respect to stating or spreading the rumour of false facts is limited to the case when the communicating person was not aware of the falseness and in this regard he or she has not failed to exercise the circumspection required by his or her profession" (CCDec4, Reasoning [39] to [41]).

[40] 1.4 According to the Constitutional Court, the first step in the application of the rules on protected expression is to determine whether the subject of the dispute concerns public matters, and the status of the person concerned remains an element of the set of criteria to be assessed in this context. The case-law of the Constitutional Court also shows that the persons' qualification mentioned in CCDec1 – ones who exercise public authority and politicians acting in public – and, by comparison, the classification deriving from the fact that the communication is related to a debate on public matters, as set out in CCDec4, are both mentioned as key criteria in different decisions.

[41] The Constitutional Court examined the quality of the person concerned as a public figure in the Decision 1/2015 (I.16.) AB (hereinafter: CCDec5) on the basis of a constitutional complaint. In CCDec5, the Constitutional Court again linked the heightened duty of tolerance and the reduced protection of dignity to the status of being a public figure rather than the public nature of the underlying case {CCDec5, Reasoning [39]}. However, the Constitutional Court also referred in this decision to its case-law laid down in CCDec3 and CCDec4, which puts the public character (public issue) rather than the status of the person concerned into the focus of the assessment.

[42] The Constitutional Court reiterates, for the future, that the first step in determining the cases of priority protection for expressions is the judicial assessment of whether the communication constitutes a statement on a matter of public concern. The Constitutional Court has already laid down the criteria necessary for this determination in CCDec4. In addition, the fact that the communication concerns a public figure may also serve as a further criterion for the courts to consider the nature of the dispute. The status of the person concerned as a public figure may be a decisive factor in determining whether the communication was made in a public matter. However, the status of being a public figure can only justify priority protection – different from the general one – of the expression of an opinion in the context of the examination of the nature of the case.

[43] Thus, according to the case-law of the Constitutional Court, in the context of the priority protection of the expression of opinion, in order to determine the nature of the case on which the opinion is based (public matter or non-public matter), the court may also examine the status of the person concerned by the opinion, his or her capacity as a public figure.

[44] 2 The Constitutional Court continued with examining the criminal law protection available under domestic criminal law in cases of expression of opinion in public affairs.

[45] Domestic substantive criminal law protects honour and reputation by defining several statutory offences, among which the opinions containing defamatory value judgements expressed in public speech are considered insult [section 180 of the old Criminal Code and section 227 of the Act C of 2012 on the Criminal Code (hereinafter: "Criminal Code")], while defamatory communication classified as a statement of fact qualifies as defamation (section 179 of the old Criminal Code, section 226 of the Criminal Code).

[46] According to the statutory definition of defamation, the offence may be committed by stating or spreading the rumour of a defamatory fact or by using an expression directly referring to such a fact (hereinafter together referred to as "statement of fact"). Neither the veracity of the fact nor an examination of the perpetrator's knowledge as to whether he or she knew the fact to be untrue is an element of the statutory definition.

[47] Although veracity is not an element of the statutory definition, the Criminal Code allows the proof of veracity as a related element and a ground for excluding criminal liability. Since the Csemegi Code, Hungarian criminal law has included rules on proving veracity with regard to defamation (as well as insult and violation of piety) (e.g. section 263 of the Act V of 1878, section 269 of the Act V of 1961, section 182 of the old Criminal Code, section 229 of the Criminal Code). Accordingly, the perpetrator shall not be punished if a fact capable of degrading honour is proven to be true [section 182 (1)

of the old Criminal Code, section 229 (1) of the Criminal Code]. By creating this ground for no criminal liability, the law-maker protects the stating of true facts. Granting possibility of excuse is conditional, because proof of veracity may only be ordered if a public interest or a legitimate private interest exists. In judicial case-law, the concept of the proof of truth is understood to mean a proof of the veracity of a fact (e.g. EBH2015. B. 29., EBH2014 B. 16., EBH, BH2016. 105., BH2015. 323.).

[48] Proof of veracity is an internationally accepted legal solution and is also used in other European countries. According to a report by the Council of Europe (hereafter: CoE), one third of the 47 member states of the organisation, including some member states of the European Union, apply a criminal law provision under which the perpetrator may be excused by proving the veracity of the facts, the public interest or good faith (Report of the CoE Directorate General of Human Rights and Legal Affairs CDMSI(2012)Misc11, pp. 7 to 8). In *McVicar v. the United Kingdom*, the ECtHR held that a legal solution which places the burden of proof on the accused exercising freedom of expression is not contrary to Article 10 ECHR [*McVicar v. the United Kingdom*, (46311/99), judgement of 7 May 2002, paragraphs 83 to 87].

[49] Proof of the veracity is a substantive legal institution, enshrined in both the old and the current Criminal Code, the essential procedural criminal consequence of which is a reversal of the burden of proof. Burden of proof derives from one of the most important principles of criminal procedure, the presumption of innocence enshrined in Article XXVIII (2) of the Fundamental Law. Accordingly, the Criminal Procedure Code states that "the burden of proving the accusation rests with the accuser" [section 4 (1) of the Criminal Procedure Code].

[50] Act XIX of 1998 on Criminal Procedure (hereinafter: "Criminal Procedure Code") allows the victim to weigh the burden of criminal proceedings and the negative consequences of the failure of the evidence to be proved against him or her in the case of defamation. According to the provisions of criminal procedural law, offences of this type are therefore, as a rule, prosecuted under private prosecution [section 52 (1) of the Criminal Procedure Code]. In the case of defamation, prosecution is represented by the prosecutor only if the act was committed to the detriment of an official, during or because of his or her official proceedings, or to the detriment of an authority in connection with its official operation [section 52 (4) of the Criminal Procedure Code]. However, the general burden of proof of the representative of accusation exists not only in a public prosecution proceeding but also in private prosecution one (Decision 666/B/2003 AB, ABH 2010, 1299, 1302).

[51] Proof of veracity is an exception to the general burden of proof on the accuser. The burden of proving a characteristics of an alleged fact, i.e. its veracity, is not on the private prosecutor or the prosecutor, but on the accused party. As a consequence, if

proving fails, the consequences will be borne by the accused person. According to judicial case-law, therefore, if the court is not satisfied as to the veracity of the facts, the accused will be found guilty (EBH2014. B. 16., Reasoning [31], BH2000. 285.).

[52] The Constitutional Court went on to examine how the constitutional system of expression of opinion is implemented in criminal law and in judicial case-law.

[53] 3.1 The truth or falsity of the asserted fact is not an element of the statutory definition of defamation under the regulation of criminal law. The falsity of the fact does not therefore have to be proved in criminal proceedings. From this character of the statutory offence, the CCDec1 concluded that defamation is based on the presumption of falsity (CCDec1, ABH1994. 219, 232.). If proving veracity is successful, this presumption is automatically "rebutted". If the defence can prove beyond reasonable doubt that the fact is true, the accused is discharged from criminal liability, otherwise the court finds the accused guilty on the basis of the presumption of falsity.

[54] However, according to the constitutional requirement formulated in CCDec1 and confirmed by CCDec4, in criminal proceedings for defamation arising from a statement made in the course of a discussion of public affairs, it is not the veracity of the fact but its falsity that must be proved in order to establish the guilt of the accused. According to the constitutional requirement, the use of a statement of fact, rumour or expression directly referring to such a fact which is capable of defaming the honour of a person may be punished only if the person who states, rumours or directly refers to such a fact which is capable of defaming the honour of a person knew that the statement was untrue in substance or did not know that it was untrue because he or she failed to exercise due care and attention. (CCDec1, ABH1994, 219.). According to the constitutional requirement, the accused can only be held criminally liable if the fact is proven to be untrue and the accused knew it. By stating this, the Constitutional Court has established a set of criteria different from the one laid down in the statutory definition of defamation.

[55] Judicial case-law has failed to consistently enforce the constitutional requirement laid down in the CCDec1. The Supreme Court, and then the Curia, have established in several decisions that only the proven veracity of the alleged (rumoured) fact excludes criminal liability, i.e. if the trial court is not convinced as to the substantive truth of the alleged or rumoured fact, the criminal liability of the perpetrator shall be established (BH2000. 285., EBH2014. B.16., Reasoning [31]).

[56] Above all, the Constitutional Court considers it important to emphasise that the presumption of innocence implies, in the assessment of criminal liability, an obligation on the part of the person entitled to make the decision to provide substantiated evidence. This also constitutes an obstacle, with a guarantee character, preventing the person subject to the proceedings to suffer adverse legal consequences that come with

the establishment of liability without having established his or her liability {most recently: Decision 30/2014. (IX.30) AB, Reasoning [56]; Decision 26/B/1998. AB, ABH 2003, 1202, 1206.} The consequence of the presumption of innocence is that the burden of proof in criminal proceedings is not on the accused, but on the authorities acting in criminal cases. The burden of proof on the authorities is not limited to establishing and assessing the facts related to guilt. The criminal liability (guilt) of the accused person can only be established by a final court judgement if it has been proven beyond reasonable doubt {Decision 30/2014 (IX.30) AB, Reasoning [56]; Decision 1284/B/1990. AB, ABH 1991, 562, 563; Decision 1406/B/1991, ABH 1992, 497, 502; Decision 26/1999 (IX.8.) AB, ABH 1999, 265, 271; Decision 1234/B/1995 AB, ABH 1999, 524, 527 to 528.} On the basis of these constitutional principles, the Be. also stipulates in detail that a fact not proven beyond reasonable doubt cannot be assessed against the accused [section 4 (2) of the Criminal Procedure Code].

[57] Thus it follows from the constitutional principles formulated in CCDec1 and confirmed in CCDec4 that the falsity of facts in a public debate must be proved in criminal proceedings. It is clear that if the falsity of a fact is not established, it cannot be proved that the accused knew of the falsity or was negligent in this respect.

[58] 3.2 In the light of the criminal law provisions, the Constitutional Court also considered it necessary to lay down the criteria governing interpretation of a further element of the constitutional criteria set out in CCDec1 and confirmed in CCDec4.

[59] According to CCDec4, "the freedom of expression regarding public affairs provides unlimited protection concerning true facts, but the protection granted with respect to stating or spreading the rumour of false facts is limited to the case when the communicating person was not aware of the falseness and in this regard he has not failed to exercise the circumspection required by his profession." (CCDec4, Reasoning [41]). The elaborated constitutional principle thus allowed for the sanctioning of intentional or negligent conduct committed by the perpetrator.

[60] However, the Constitutional Court, in an earlier case, also relating to the constitutionality of the offence of defamation, reached a different conclusion. In its reasoning in CCDec2, the Constitutional Court expressly indicated, on the basis of the provision of the Act on the Legal Status of Members of Parliament, that the statutory offences of insult and defamation punishable under the old Criminal Code "should be applied in case-law with the constitutional content established in CCDec1 and further elaborated in this decision" (CCDec2, ABH 2004, 490, 500) In CCDec2, the Constitutional Court pointed out for the first time that the offence of defamation can only be committed intentionally, there was no negligent form of the offence in the old Criminal Code (section 179 of the old Criminal Code) (CCDec2, ABH 2004 490, 501). As a consequence, the absolute limit for expressing an opinion in public affairs under

CCDec2 was, in the case of Members of Parliament, knowingly stating false and defamatory facts.

[61] The statutory definition of defamation has not changed in the current Criminal Code (section 226 of the Criminal Code), thus the offence can only be committed intentionally. The law-maker does not provide for the punishment of a negligent act under the current criminal law either.

[62] The Constitutional Court, in its review in CCDec4, referred to and considered the criteria set out in CCDec1 as the guiding principle, while disregarding the principles laid down in CCDec2. Thus, it maintained the negligent form of the offence of defamation, as set out in the constitutional requirement under CCDec1.

[63] The Constitutional Court attached particular importance to the fact that the law-maker did not provide for the punishment of the negligent form of the offence of defamation in the current Criminal Code. In the light of this and of what was stated in the reasoning of CCDec2, it held that the constitutional requirement relating to the form of defamation which may also be committed by negligence could no longer be maintained.

[64] 3.3 The Constitutional Court then also examined how certain elements of the constitutional criteria are applied in the case-law of the courts. The assessment of this question is of particular importance because the present constitutional court proceeding is based on section 27 of the ACC, i.e. it is aimed at examining an individual court decision.

[65] The statement in CCDec1 that the disclosure of true facts concerning public figures - even if they are capable of diminishing the social esteem of those persons - shall always be considered to be in the public interest, is consistently upheld in judicial case-law (BH1998. 412.; EBH1999. 87.; BH2000. 285.; EBH2014. B.16., Reasoning [29]). Furthermore, the constitutional requirement laid down in the holdings of CCDec1 is also present in judicial case-law. For example, in the case underlying the decision in principle No. EBH2005. 1193, the court applied the constitutional requirement set out in the holdings of CCDec1, including the element on establishing the negligent form of the offence, and based on this, found the accused guilty.

[66] In the judicial decision in principle No. EBH2005. 1289, the court took into account the constitutional requirement under CCDec1, but did not consider it applicable together with the relevant provisions of substantive law. The court found that the Criminal Code only punishes defamation if it is committed intentionally. Therefore, even if the constitutional requirement orders criminal liability in the case of a negligent form of committing the offence, it is not possible to apply this under the Criminal Code.

[67] However, the court did not apply the constitutional requirement in the proceedings underlying the case No. BH2011. 186.

[68] The court decisions cited show that in judicial case-law certain elements of the set of constitutional criteria are not consistently enforced. These have been ignored by the courts in several cases, while in other cases it has been pointed out that the requirement in question cannot be applied in conjunction with the provisions of the Criminal Code.

[69] 4 The application of the set of constitutional criteria for the enforcement of the expression of opinions enjoying prominent protection, such as the removal of the negligent form of defamation from the set of constitutional criteria, may shrink the scope of criminal liability. On the one hand, it ensures a broader exercise of the right to freedom of expression in public affairs, but on the other hand, it restricts the exercise of the fundamental rights protected by the statutory definition of defamation: the rights to human dignity and to reputation. In this sense, the right to freedom of expression and the right to human dignity and reputation are competing fundamental rights. The Constitutional Court has therefore examined the impact of the application of the set of constitutional criteria on the exercise of the rights to dignity and reputation.

[70] 4.1 Article II of the Fundamental Law guarantees the right to human dignity, while Article VI (1) provides for the protection of privacy. There is a particularly close link between the right to human dignity enshrined in Article II of the Fundamental Law and the right to privacy granted in Article VI (1) of the Fundamental Law. Article II of the Fundamental Law provides the foundation for the protection of the inviolable sphere of privacy. This area is free from any State interference, as it is the basis of human dignity. However, according to the Fundamental Law, the protection of privacy is not limited to the inner or intimate sphere also protected by Article II of the Fundamental Law, but is also extended to privacy in the broad sense (keeping contacts) and also to the spatial sphere where one's private and family life evolves (home). In addition to the above, the image of an individual's life (the right to reputation) also enjoys individual protection {Decision 32/2013. (XI.22.) AB, Reasoning [82] to [84]}.

[71] The Fourth Amendment to the Fundamental Law, with the introduction of Article IX (4), which entered into force on 1 April 2013, stipulated that the right to freedom of expression must not be directed against the human dignity of others and, with this provision, also strengthened the protection of the dignity of public figures. By linking the application of the rules on protected expression to the subject-matter of the dispute (public matter) rather than to the capacity of the public figure, CCDec3 and CCDec4 essentially fulfilled this constitutional requirement. The status of the person is no longer at the centre of the set of criteria for the assessment, therefore the status of

being a public figure cannot in itself and necessarily result in applying the rules of reduced protection of dignity to the case in question. In fact, communications relating to a public figure which cannot be linked to public affairs or do not have a public nature do not justify the application of the rules on protected speech.

[72] Compared with CCDec1, CCDec3 and CCDec4 have, however, also broadened the scope of protected speech by limiting the prohibition of value judgements that infringe the right to human dignity to the narrowest still justified scope, namely to communications that call into question the human status.

[73] However, the Constitutional Court has so far not made any such clarification with regard to the statement of facts, but has only maintained the criteria laid down in CCDec1, i.e. it has defined the limit of protected expression as the statement of false facts made knowingly or by negligent conduct in disregard of the rules of one's profession or vocation.

[74] Also in the context of factual statements, the Constitutional Court should examine the limits of permissible communications which may not infringe human dignity and the right to reputation deriving therefrom, even in the discussion of public affairs. Having considered this, the Constitutional Court in the present decision states that, on the basis of the set of constitutional criteria summarised, the rules on protected expression do not extend to untrue statements of fact. Knowingly stating untrue facts is as extreme a form of conduct as denying human status in terms of value judgements, and it is therefore justified that criminal law protection should be available to the victim as an *ultima ratio*.

[75] 4.2 In the Constitutional Court's view, protection by criminal law with regard to the expression of opinions in public affairs is limited – as an *ultima ratio* – to the sanctioning of extreme behaviour. In this respect, the Constitutional Court also points out that the decriminalisation of protected expression is a long-standing trend in European countries. By analysing the criminal law intensity of constitutional protection, the Constitutional Court established as early as in the CCDec1 that, as a clear tendency seen in the European countries, less and less tools of criminal law are applied with regard to the expression of opinion in public affairs (ABH 1994, 219, 224). This ambition has remained unchanged in the period since then. CoE has in several cases addressed the question of the relationship between defamation and the freedom of expression, with particular reference to the rights and responsibilities of the press. In its resolution on the decriminalisation of defamation, adopted in the year 2007, the CoE Parliamentary Assembly took the initiative to ensure that legislation defines defamation more precisely and to promote that civil law provide effective legal protection for the dignity of persons subjected to defamation [Resolution 1577(2007)]. According to a report by the CoE, prepared in the year 2012, criminalisation of defamation remains a

feature of the legal systems of CoE Member States, but there is a clear trend towards the abolition of criminal sanctions and the imposition of lighter penalties [CoE Directorate for Human Rights and Legal Affairs, Report No. CDMSI(2012)Misc11, pp. 7 to 8].

[76] The ECtHR has dealt with restrictions on freedom of expression in a number of judgements. The Constitutional Court has already provided a detailed overview of the relevant ECtHR case-law in CCDec4. (CCDec4, Reasoning [34] to [38]). With regard to the present constitutional complaint, the Constitutional Court has based its decision solely on the case-law of the ECtHR followed in Hungarian cases. Accordingly, the international court has emphasised in several cases that Article 10 (2) (freedom of expression) of the European Convention on Human Rights (ECHR) "leaves little scope for restricting political speech and debate on matters of public interest." [Karsai v. Hungary, (5380/07), 1 December 2009, para. 35]. Nevertheless, depending on the specific circumstances of the case, the ECtHR does not consider the proportionate application of a criminal sanction to be contrary to Article 10 ECHR [Szima v Hungary, (29723/11), 9 October 2012, paras 31 to 32].

[77] International trends indicate that European States are not ensuring the protection of dignity through criminal law but rather through other branches of law, thereby allowing greater scope for the right to express one's views on public affairs.

[78] 4.3 The deterring and stigmatising effect of a criminal sanction may have a serious restraining force regarding the expression of one's opinion. Consequently, according to the consistent case law of the Constitutional Court, maintaining the restriction of the expression of opinion in public affairs through the tools of criminal law should only offer protection against the most serious cases when the expressed opinion injures a constitutional right or there is a direct threat of the injury of right (CCDec4, Reasoning [30]). However, the protection of dignity is not only achieved through the rules of criminal law.

[79] The constitutional protection of the right to human dignity is realised in domestic law through a system of parallel or even simultaneous enforcement of claims provided by different branches of law. The Constitutional Court has consistently held that "criminal law, while protecting the person and honour of the victim, perceives it as an injury to a member of society, as an act to be condemned by society, as a danger to society as a whole, and the punishment is primarily intended to provide moral satisfaction and prevention. The individual, on the other hand, renounces the unrestricted exercise of his or her certain individual rights precisely in order to be able to obtain redress through the society for the harm done to him or her, and to be protected by the society. Although civil law also considers the violation of personal rights to be undesirable, the aim is essentially to stop the offending conduct and to

compensate the victim. [...] Indeed, the constitutional protection of personality rights is achieved through the system of parallel or even simultaneous enforcement of claims provided by different branches of law." (CCDec5, Reasoning [44]).

[80] 5 On the basis of the above, in order to clarify its own case-law and to provide a clear set of criteria for judicial case-law, the Constitutional Court considered it necessary to review and summarise for the future the elements of the constitutional guarantee system for the expression of opinions in public affairs.

[81] In accordance with its consistent case-law, the Constitutional Court has allowed a narrower scope for restricting the expression of opinions in the discussion of public affairs as compared to other cases. This approach has been upheld by the Constitutional Court in relation to the criminal law means of restricting expression in order to protect human dignity, as early as when it defined the constitutional requirement under the CCDec1, and upheld it in the decisions delivered after the entry into force of the Fundamental Law.

[82] Under the set of constitutional criteria governing the cases of protected expression and an extra duty of tolerance, the court should first examine whether the contested communication reflects speech on public matters or a position expressed in a public debate. The Constitutional Court has already laid down the set of constitutional criteria for this examination in CCDec4 (summarised in CCDec4, Reasoning [39]). The status of the person concerned as a public figure is relevant in this context, as part of this system of criteria. It is the consistent case-law of the Constitutional Court to consider public officials and politicians in public office as public figures (See: CCDec1, Reasoning [31]). However, it is for the courts to determine whether a person is a public figure in specific cases. Popular knowledge of the person, his or her role in shaping opinions, provides further support for assessing the nature of the case and its quality in relation to a public debate. However, the central issue in determining the limits of expressions remains whether a communication made in relation to the person concerned constitutes a matter of public concern. And if the communication is a statement on a matter of public concern, it is subject to the constitutional rules of protected speech on the one hand, and of reduced dignity protection (duty of tolerance) on the other.

[83] A further element of the constitutional test is the distinction between statements of facts and value judgements, for which the Constitutional Court has also provided guidance in CCDec4. (CCDec4, Reasoning [40] to [41]) The Constitutional Court considers these guidances to be authoritative for the future and to apply in unchanged form.

[84] The Constitutional Court has, however, clarified the constitutional criteria concerning the limits of constitutional protection in relation to statements of facts in the present decision as follows. In domestic criminal law, defamation is the criminal law

instrument for the protection of the right to human dignity and the restriction of the right to freedom of expression in the case of speech constituting statements of fact. The Constitutional Court does not uphold for the future the constitutional criterion relating to the form of the offence which can also be perpetrated by negligence, as first set out in the holdings of CCDec1 and then confirmed in CCDec4.

[85] In the context of the protected expression of opinion in public affairs, the clarification of the veracity of the fact remains a key issue in the view of the Constitutional Court. The truth of a fact is established by ordering the proving of its veracity. According to the identical wording of section 182 (1) of the old Criminal Code and section 229 (1) of the Criminal Code, "the perpetrator shall not be punished if the fact capable of degrading honour proves to be true", i.e. the accused may provide effective defence in criminal proceedings by proving the veracity of the fact. However, the failure to prove veracity in the scope of the protected expression shall not automatically lead to establishing that the perpetrator is guilty.

[86] The Constitutional Court notes that in individual cases it is for the court to consider whether, in the context of proving the falsity of a fact, a possibility is offered to prove veracity in the specific criminal proceedings and what framework is set for performing the accuser's burden of proof.

[87] The Constitutional Court then proceeded to assess the specific judicial decision challenged in the petition, on the basis of the system of constitutional guarantees for the expression of opinions in the context of public debates.

V

[88] 1 The present Constitutional Court procedure was initiated on the basis of a constitutional complaint, and accordingly seeks to review the constitutionality of judicial decisions in an individual case. In its proceedings, the Constitutional Court therefore took into account – in addition to the general findings made in CCDec1 and CCDec2, which were in force at the time of committing act, in the procedure for the review of norms – the findings of general interest made in CCDec3 and, with regard to a specific case, laid down in CCDec4.

[89] In the specific case, the petitioner challenged the conduct of the courts in the criminal proceedings against him in relation to the proof of veracity and the application of the consequences thereof.

[90] The court of first instance, according to the judgement, ordered the proof of veracity in the public interest. Referring to the findings made in CCDec1 and the case-law developed in the light of them, the judgement stated that "in the case of proof of veracity, only proved facts can exclude the punishability of the perpetrator" (page 4,

paragraph 3 of the judgement at first instance). The court added that the accused – i.e. the petitioner – “was also a registered candidate running for mayor’s position in the 2010 local government elections [...]. In that respect, he himself was a public figure and took part in the political process, and therefore he cannot justifiably claim that he was merely a citizen criticising the mayor who had until then exercised public authority. In this respect, it is clear from the relevant decision of the Constitutional Court that the accused, as a politician acting in public capacity, should have acted with due care and diligence in making his statements of facts and opinions concerning the other party when examining the veracity of his statements.” (page 5, paragraph 1 of the judgement at first instance). Finally, as regards the proving of veracity, the Court pointed out that it could only be aimed at “whether the statements of fact made by the accused had a content of truth which could serve as a basis for bringing possible criminal proceedings against the victim [...]. However, in the court's view, no such facts in support of the accused's allegations had emerged in the course of the evidentiary proceedings.” (page 5, paragraph 2 of the judgement at first instance). In view of the above, the court concluded that “the evidentiary procedure conducted did not reveal any data supporting the accused's factual allegations, nor could they be expected from further evidence. The accused was aware of the facts with regard to both the felling of trees and the construction of the funeral parlour, he was personally present at several events, as is clear from the attached minutes, and he was aware of official decisions, as is clear from the documents, therefore his claim that he had acted in good faith when drafting the election booklet is not admissible.” (judgement at first instance, page 7, paragraph 4 and page 8, paragraph 1).

[91] The court of second instance held that the first instance court “correctly concluded that none of the defendant's defamatory allegations had been proved” (judgement of second instance, page 2, paragraph 2).

[92] The Curia did not share the arguments of the review motion in relation to the proof of veracity, considered the specific findings of the courts in this regard to be correct and upheld them.

[93] The challenged statements were made during the campaign period. According to a previous decision of the Constitutional Court, “it is in the public interest that during the campaign not only public affairs but also the suitability of individual candidates and the programme of the candidate/supporting organisation are discussed. This may occasionally involve fierce verbal battles, but it is part of the freedom of expression in the campaign.” {Decision 5/2015. (II. 25.) AB, Reasoning [26]} The constitutional criteria determining the criminal assessment of a communication, i.e. the finding of defamation or insult, as set out above, shall also apply to communications made during the campaign period, as the election campaign is an integral part of the discussion of public affairs. The courts in the main proceedings were therefore correct to recognise that the

specific expression contained a statement of fact made during the discussion of public affairs.

[94] With regard to the petitioner's objections to the proving of veracity ordered and carried out in the criminal proceedings, the Constitutional Court held as follows.

[95] Stating false facts in the context of the discussion of public affairs does not automatically entail criminal liability under the constitutional criteria relating to the expression of opinion, as summarised above. A public speaker may therefore speak about abuses even if he or she cannot prove them. In the case of a statement of fact that proves to be untrue, the constitutional criteria shift the focus to the perpetrator's consciousness related to the falsity of the fact (c.f. CCDec4, Reasoning [41]; CCDec1, holdings, paragraph 3, ABH 1994, 219.)

[96] At the time of committing the offence described in the constitutional complaint, CCDec1 was in force. According to this, the statutory offence of defamation is based on the presumption of falseness. By proving the veracity of a fact, this presumption can be rebutted, and by proving the truth, the accused is exempted from criminal liability. The failure to prove the truth, however, is not sufficient to establish the criminal liability of the accused in the case of a statement of fact made in the course of a discussion of public affairs, in accordance with the constitutional criteria set out above. According to the constitutional requirement laid down in CCDec1, in order to be held criminally liable, it is also necessary to establish in the criminal proceedings that the accused knew that the defamatory fact which he or she had alleged, rumoured or used an expression referring to was untrue (c.f. CCDec4, Reasoning [41]; CCDec1, holdings, paragraph 3, ABH 1994, 219.) This is enforced in the judicial case-law with the application of the proof of veracity.

[97] In the court proceedings underlying the present Constitutional Court proceedings, the court of first instance based its finding of criminal liability on the fact that the accused was aware of the facts both with regard to the felling of the trees and the construction of the funeral parlour, because he was demonstrably present at several events and was aware of the decisions of the authorities, and that his intention was therefore to make untrue statements of fact.

[98] The Constitutional Court therefore considered that the court of first instance had recognised the fundamental rights relevance of the case, had given effect to the guarantees of enhanced constitutional protection in the context of public issues and had taken its decision in accordance with the relevant constitutional requirement. Since the court of second instance upheld the judgement of the first instance, albeit on different grounds, and the Curia upheld the judgements of the lower courts in the review proceedings, the Constitutional Court found no ground to annul the final

decision. On the basis of the above, the Constitutional Court rejected the constitutional complaint under Article IX (1) of the Fundamental Law.

Budapest, 28 November 2017.

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