7/2014. (III. 7.) AB on the unconstitutionality and the annulment of the text "on the basis of acknowledgeable public interest" in Section 2:44 of the Act V of 2013 on the Civil Code

On the basis of a petition aimed at the ex-post examination of the compliance of a statute with the Fundamental Law, the plenary session of the Constitutional Court – with dissenting opinions by *dr. István Balsai, dr. Egon Dienes-Oehm, dr. Imre Juhász, dr. Barnabás Lenkovics, dr. Béla Pokol, dr. László Salamon* and *dr. Mária Szívós* Judges of the Constitutional Court – has adopted the following

decision:

The Constitutional Court establishes that the text "on the basis of acknowledgeable public interest" in Section 2:44 of the Act V of 2013 on the Civil Code is in conflict with the Fundamental Law therefore the Constitutional Court annuls it. The annulled text shall not enter into force.

In line with the annulment, Section 2:44 of the 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 public figures]*

Exercising the fundamental rights guaranteeing the freedom of debates about public affairs may restrict – to the necessary and proportional extent – the protection of the personality rights of a public figure without injuring human dignity."

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

Reasoning

I.

The commissioner for fundamental rights submitted to the Constituional Court a petition for ex-post normative control, asking for the constitutional review of Section 2:44 of the Act V of 2013 on the Civil Code (hereinafter: "new Civil Code") taking force on 15 March 2014. According to his opinion formed on the basis of reviewing the studies dealing with 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 challenged regulation on criticising public figures. As pointed out by the petitioner: according to the standard specified in the new Civil Code, public figures can only be made subject to heavy criticism in the interest of enforcing the fundamental rights guaranteeing the debating of public affairs, in particular the freedom of opinion and the freedom of the press with the fulfilment of three conjunctive conditions: (1) if the criticism does not violate the human dignity of the person concerned, (2) if its extent is necessary and proportionate, and (3) if the existence of "acknowledgeable public interest" can be verified. In the opinion of the commissioner for fundamental rights, one of the conditions, the requirement of having an "acknowledgeable 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 force and prior to the formation of the judicial practice. The existence of "acknowledgeable public interest" as a condition of allowing the criticising of public figures to a wider extent than other persons would pose a disproportionate restriction on the freedom

of speech and the freedom of the press and it would not properly guarantee the debating of public affairs and the criticising of the operation of public power.

The petition refers to the fact that according to Article IX paras (1) and (2) of the Fundamental Law, everyone shall have the right to freedom of speech and Hungary shall recognise and protect the freedom and diversity of the press, and shall ensure the conditions for free dissemination of information necessary for the formation of democratic public opinion. In line with Article IX para. (4) incorporated with the fourth amendment of 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 holds that the changes in the provisions of the Fundamental Law in the field of the freedom of speech and the freedom of the press do not imply the disregarding of the Constitutional Court's judicial practice – based also on the practice of the European Court of Human Rights – related to the possibility of criticising public figures and the protection of their personality rights. On the contrary: previous holdings of the Constitutional Court remain valid. It is a fundamental and clear requirement in the Constitutional Court practice that although the freedom of the press and the freedom of speech enjoy special protection, it is not without limits and it may not imply the disproportionate violation of others' – in this case public figures' – right to human dignity. However, at the same time, the petition refers to the Constitutional Court's constant practice of requiring special protection for the freedom of the press and the freedom of speech when they affect public affairs, the exercising of public authority or the activities of persons performing public duties or undertaking public roles, therefore with regard to persons exercising public authority and politicians acting as public figures the constitutionally protected scope of the freedom of speech is broader than in the case of other persons.

According to the commissioner for fundamental rights, along with the special protection of the freedom of speech and the freedom of the press in the course of criticising public figures, the constitutional limits are the violation of human dignity [Article II and Article IX para. (4) of the Fundamental Law] and the compliance with the necessary and proportionate extent [Article I para. (3) of the Fundamental Law]. These conditions result from the Fundamental Law itself and from the Constitutional Court's practice, specifying it. At the same time, requiring the existence of "acknowledgeable public interest" is an unjustified and disproportionate condition. In the petitioner's opinion, even the attribute of "acknowledgeable" 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 "non acknowledgeable" public interest. In his opinion, the heavy criticism of public figures especially the ones exercising public authority – as long as it remains within the constitutional limits specified by the Constitutional Court – is always in the interest of the public: it is an acknowledgeable interest in the free formation of the public opinion, which is indispensable for democracy. Accordingly, the incorporation of the condition of "acknowledgeable public interest" leads to an insecure legal situation and a disproportionate restriction that would clearly be a withdrawal topping the already inconsistent judicial practice.

Based on the above reasoning the commissioner for fundamental rights holds that the text "on the basis of acknowledgeable 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 State under the rule of law enshrined in Article B para. (1) of the Fundamental Law, and it also violates the provisions of Article IX paras (1) and (2) of the Fundamental Law (freedom of speech and freedom of the press) as it allows the disproportionate restriction of rights. The commissioner initiated the annulment of the challenged normative text.

II.

1. The relevant provisions of the Fundamental Law:

”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, 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 speech.
(2) Hungary shall recognise and protect the freedom and diversity of the press, and shall ensure the conditions for 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 speech may not be exercised with the aim of violating the human dignity of others.”

2. The relevant provision of the new Civil Code challenged by the commissioner for fundamental rights:

”Section 2:44 *[Protection of the personality rights of public figures]* Exercising the fundamental rights guaranteeing the freedom of debates about public affairs may be restricted on the basis of acknowledgeable public interest – to the necessary and proportional extent – the protection of the personality rights of a public figure without injuring human dignity.”

III.

The petition is well-founded.

1. The reasoning by the commissioner for fundamental rights is centred upon assuming that the challenged regulation not only violates the requirement of legal certainty but it also results in the disproportionate restriction of the freedom of speech and the freedom of the press. Accordingly, the Constitutional Court first examined the petition in relation to Article IX of the Fundamental Law, although Section 2:44 of the new Civil Code contains broader references to the fundamental rights serving the free debating of public affairs. In the course of the review, the Constitutional Court took account of the fundamental justifications of the freedom of speech and the freedom of the press in the theory and the intellectual history as they can provide relevant aspects for the constitutional interpretation of the possibilities of criticising public figures, followed by the assessment of its own judicial practice developed prior to the Fundamental Law's taking effect as well as the main guidance resulting from the judicial practice of the European Court of Human Rights, concluding with examining the

interpretations that are in line with the provisions of the Fundamental Law, and finally it passed a decision about the constitutionality of the normative provision under review.

1.1. The theoretical justifications of the freedom of speech and the freedom of press can traditionally be classified into two large groups. Among the instrumental justifications the ones focusing on the search for justice and the service of the democratic public opinion are worth mentioning, while the constitutive justification is centred on individual self-expression and individual autonomy. In the course of examining the present petition the Constitutional Court is going to list the fundamental aspects of theoretical and intellectual historical justifications as these factors have a significant influence on constitutional interpretation in the field of limits of criticising public figures.

According to the first justification of the freedom of speech in history, the free expression of opinions has to be guaranteed in the interest of the search for justice, as justice can only present itself to people through the free collision of views and thoughts.

Another subsequent branch of instrumental justifications emphasized the serving of democracy in the context of the freedom of speech.

Based on the so called democratic theory of the freedom of speech, the participation of the citizens in public affairs is indispensable for democracy and the democratic self government, presuming that the participants may express their views in the matters that affect the community. The constitutive justification of the freedom of speech is based on the individual's self expression, the importance of the individual's autonomous action. Accordingly, the right to the freedom of speech is justified not only by the role it plays as an instrument for achieving certain results, but also by the mere fact that people should be able to express themselves without restrictions and to communicate their thoughts, as the value of the freedom of speech cannot be underestimated with regard to the advancement of one's personality.

In the context of the possibilities of criticising public figures the Constitutional Court does not emphasize the differences between the various justifications and it focuses on the fact that the fundamental interest in debating public affairs as freely as possible is a common element of all the theories. The arguments stressing the primacy of individual self-expression also demand the freedom of speech in the affairs of the community, and emphasizing the joint search for justice and the importance of democratic public opinion and the democratic formation of willpower imply the guaranteeing of the freedom of speech as widely as possible especially in the field of debating public affairs.

1.2. The Constitutional Court's practice developed prior to the Fundamental Law taking effect contained both the individual aspects justifying the freedom of speech and the freedom of the press and the community-based arguments underlying the importance of forming a democratic public opinion.

According to the Constitutional Court's practice followed since the Decision 30/1992. (V. 26.) AB (hereinafter: CCDec 1) laying down the foundations of the constitutional interpretation of the freedom of speech, the freedom of expression has a special position among constitutional fundamental rights as it is the "mother right" of several freedoms, the so-called 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 guarantees 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 the freedom of expression, the former Constitution imposed the duty on the State to secure the conditions for the creation 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" [CCDec 1, ABH 1992, 167, 172].

The Constitutional Court repeated this argumentation and applied it the freedom of the press as well when it stated that "the State must guarantee the freedom of the press, recognising that the press was the pre-eminent tool 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 plays 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].

The Constitutional Court has already examined in a criminal law context the collision between the freedom of speech and the freedom of the press with the protection of the personality rights of public figures, and its interpretation of the Constitution was also based on the above concerns. In the Decision 36/1994. (VI. 24.) AB (hereinafter: "CCDec 2") the Constitutional Court held that the 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 the freedom of expression corresponds to the constitutional requirements of a democratic State under the rule of law" (CCDec 2, ABH 1994, 219, 228).

According to 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, the free criticism of the institutions of the State and of the local governments – even if done in the form of defaming value judgements – is a fundamental right of the citizens, i.e. the members of the society, which is an essential element of democracy" (CCDec 2., ABH 1994, 219, 230).

As held by the Constitutional Court at that time, even in the period of the establishment and consolidation of the institutional structure of democracy there was no constitutional interest which would justify the restriction of communicating value judgements in the protection of authorities and official persons. At the same time the Constitutional Court pointed out that the falsification of facts cannot enjoy constitutional protection, therefore even sanctions under criminal law may be imposed in the cases when a person who states a fact capable of offending one's honour, and was aware of that the essence of his or her statement is false or does not know about its falseness due to his or her failure to exercise caution reasonably expected of him/her pursuant to the rules applicable to his or her profession or occupation.

The Constitutional Court applied the arguments related to the debating of public affairs also in the context of the restricting of the freedom of speech under civil law. As emphasized in the Constitutional Court's Decision 57/2001. (XII. 5.) AB examining the incorporation of the right of reply into the Civil Code, "the assessment of the constitutionality of restriction is based on the particularly important role played by the freedom of expression and the freedom of the press in maintaining a democratic system, informing the community and forming public opinion. This role is in the foreground, therefore, when a political debate or the criticism of the State is at stake, these freedoms may only be restricted within a limited scope" [Decision 57/2001. (XII. 5.) AB, ABH 2001, 484, 494].

Finally the Constitutional Court summarised in the Decision 165/2011. (VI. 20.) AB, dealing with questions related to media law, its views about the justification of the freedom of

speech and the freedom of the press, and in addition to the freedom of self-expression it underlined the importance of the role of citizens played in forming the democratic public opinion. “In the practice of the Constitutional Court, the freedom of speech enshrined in Article 61 para. (1) of the Constitution has double foundations: the freedom of speech serves the purposes of both the full development of individual autonomy and, from the side of the community, the possibility of creating and maintaining a democratic public opinion. […] Press is an institution of the freedom of speech. Therefore the protection of the freedom of the press – since it serves the purpose of the free expression of speech, communication and opinions – is also justified in a twofold way: in addition to being a subjective right, it serves the community aim of creating and maintaining a democratic public opinion. […] By exercising the right to the freedom of the press, the person who exercises this right becomes an active former of the democratic public opinion. In this role, the press controls the activities of public figures and institutions, as well as the process of decision making, and it informs the political community and the democratic public (‘watchdog role’) [Decision 165/2011. (XII. 20.) AB, ABH 2011, 478, 503].

1.3. The Constitutional Court examined to what extent it may rely in the present case – after the Fundamental Law taking force – on formerly elaborated justifications and arguments in the course of interpreting the freedom of speech and the freedom of the press. According to the Decision 13/2013. AB (VI. 17.), in the course of reviewing the constitutional questions to be examined in the new cases, the Constitutional Court “may use the arguments, legal principles and constitutional correlations elaborated in its previous decisions if the application of such findings is not excluded on the basis of the identical contents of the relevant Article of the Fundamental Law and of the Constitution, the contextual identification with the whole of the Fundamental Law, the rules of interpretation of the Fundamental Law and by taking into account the concrete case, and it is considered necessary to incorporate such findings into the reasoning of the decision to be passed” {Decision 13/2013. (VI. 17.) AB, Reasoning [32]}.Therefore, first of all, the Constitutional Court has to take into account the changes in the text of the constitution as presented in Article IX of the Fundamental Law with regard to the freedom of speech.

At the time of the elaboration and the consolidation of the Constitutional Court’s practice as detailed above Article 61 para. (1) of the Constitution provided that in the Republic of Hungary everyone has the right to freely express his opinion, and furthermore, to have access to, and distribute information of public interest, and paragraph (2) contained that the Republic of Hungary recognizes and respects the freedom of the press. The constitution-forming power amended – from 7 July 2010 – Article 61 of the Constitution by refining the text of the first two paragraphs and by adding a new (3) paragraph: “For the purpose of forming a democratic public opinion, everyone has the right to receive adequate information about public affairs.” Thus the constitution-amending power did not affect the previously interpreted content of the freedom of speech and the freedom of the press, indeed, it provided a constitutional ground for the twofold justification of these rights – as elaborated in the Constitutional Court's practice – and incorporated into the Constitution the aspects of forming a democratic public opinion.

The contents of the text of the Fundamental Law taking force on 1 January 2012 is identical with the text of the Constitution after the above amendment. According to Article IX para. (1), everyone shall have the right to freedom of speech and according to para. (2), Hungary shall recognise and protect the freedom and diversity of the press, and shall ensure the conditions for free dissemination of information necessary for the formation of democratic public opinion. It means that from the very beginning the State’s duty to provide the conditions for the democratic public opinion is presented with a constitutional force in the Fundamental Law

in the area of the freedom of speech and the freedom of the press. Although paragraph (3) of Article IX incorporated with the fourth amendment of the Fundamental Law regulates the special rules of political advertisements in election campaigns, it is worth noting that the declared purpose of this provision was also the promotion of a democratic public opinion to the fullest possible extent.

Based on the above, the Constitutional Court established that the Fundamental Law reinforced the interpretation, developed in the Constitutional Court's practice, 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. Consequently the Constitutional Court assessed the petition by taking into account and using the arguments contained in the previous decisions of the Constitutional Court.

In the present case the former arguments related to the interpretation of the 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 text of the previous Constitution in the field of the freedom of speech, and the difference found in Article IX para. (4) deals in particular with personality protection. According to the provision incorporated by the fourth amendment of the Fundamental Law, the right to freedom of speech may not be exercised with the aim of violating the human dignity of others. However, from the very beginning it has been the cornerstone of the Constitutional Court’s interpretation of the freedom of speech that the human dignity of others can restrict the freedom of speech [CCDec 1., ABH 1992, 167, 174]. Based on the general rules of restricting fundamental rights, the relevant constitutional question was – and still it is – in which cases the rules protecting human dignity qualify as necessary and proportionate limitations over the freedom of speech [Article I para. (3) of the Fundamental Law]. The right to the protection of human dignity is only unrestrictable as the legal determinant of human status, while as a general personality right and the resulting partial rights can be restricted. In the context of the collision of the 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 ”the laws restricting the freedom of expression are to be assigned a greater weight if they directly serve the realisation or protection of another subjective fundamental right” [CCDec 1., ABH 1992, 167, 178]. Accordingly the human dignity of others has been interpreted in the Constitutional Court’s practice as a clear limitation over the freedom of speech, and the Constitutional Court elaborated the interpretation of the freedom of speech and the freedom of the press – including the earlier arguments related to the possibility of criticising public figures – in the light of the above.

2.1. In addition, in the course of examining the petition, the Constitutional Court took account of the case law of the European Court of Human Rights (ECHR). Hungary as a state party joined the Convention on the protection of human rights and fundamental freedoms promulgated in Act XXXI of 1993 (hereinafter: “Convention”), therefore the Constitutional Court applies as the minimum requirements of protecting rights in the course of elaborating the Hungarian constitutional standards the aspects found in the judicial practice of ECHR on the interpretation of the Convention {Decision 61/2011. (VII. 13.) AB, ABH 2011, 290, 321; reinforced e.g. in: Decision 22/2013. (VII. 19.) AB, Reasoning [16]}.

The case law of ECHR is rich in the elaboration of special standards about the limits of restricting the expression of opinions during the debating of public affairs. These particular standards unfold, in the field of debating public affairs, about the interpreting of the 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 precondition of both the social progress and the individual development, and it also protects opinions that are offending, shocking or disturbing [ECHR, *Handyside v. the United Kingdom* (5493/72), 7 December 1976, paragraph 49; reinforced e.g. by: ECHR, *Observer and Guardian v. the United Kingdom* (13585/88), 26 November 1991, paragraph 59].

It was in the *Lingens v. Austria* case where the ECHR first ruled in favour of the freedom of public debates in contrast with personality protection. It underlined that freedom of political debate is at the very core of the concept of a democratic society, and the 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 ECHR explained that the limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. No doubt Article 10 enables the reputation of others to be protected with regard to the freedom of speech, and this protection extends to politicians too, but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues. Any sanction applied without due account to the above is liable to hamper the press in performing its task as purveyor of information and public ”watchdog”. The ECHR emphasized that a distinction had to be made between the statement of facts and value judgements as in the latter case the proving of the truth could not be required. [ECHR, *Lingens v. Austria* (9815/82), 8 July 1986, paragraphs 42–47]

On the basis of the arguments presented in the *Lingens v. Austria* case, it was the consequent position of the ECHR 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 the freedom of speech – that exceptions to freedom of expression must be interpreted narrowly [one of the recent reinforcements in: ECHR, *Cholakov v. Bulgaria* (20147/06), 1 October 2013, paragraphs 29–31].

As pointed out by ECHR, the limits of acceptable criticism are wider with regard to a politician acting in his public capacity than in relation to a private individual. The former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance, especially when he himself participates in public debates [ECHR, *Oberschlick v. Austria* (11662/85), 23 May 1991, paragraph 59].

Subsequent case law of ECHR also made it clear that the extra protection of opinions expressed in relation to public affairs is not restricted to political debates in the narrow sense and to politicians. On the one hand, the right to the freedom of speech guaranteed in the Convention provides special protection for the freedom of debating not only questions of party-politics but also other questions that affect the community [ECHR, *Thorgeirson v. Iceland* (13778/88), 25 June 1992, paragraph 64]. On the other hand the ECHR refers to the paramount importance of debating public affairs not only in the cases when the challenged expression concerns politicians or official persons, but also when the given question of public interest affects private individuals (too). In the latter case the threshold of tolerance of private individuals must be raised as well [ECHR, *Bladet Tromsø and Stensaas v. Norway* (21980/93), 20 May 1999].

Accordingly the application of particular standards does not depend merely on the status of the person concerned, but it is determined by the public nature of the opinion expressed. In certain special circumstances the public’s right to be informed can even extend beyond the public role itself to aspects of the private life of public figures, particularly where politicians are concerned [ECHR, *Von Hannover v. Germany (no. 2)* (40660/08 and 60641/08), 7 February 2012, paragraph 110].

However, it is pointed out by the Constitutional Court that the complex criteria applied in the case law of ECHR makes further distinctions between those who exercise public power, as the arguments applicable to politicians exercising public authority or acting as public figures do not have the same force concerning all public servants. Beyond doubt civil servants are subject to wider limits of acceptable criticism but not always to the same extent as in the case of politicians. [ECHR, *Thoma v. Luxembourg* (38432/97), 29 March 2001, paragraph 47]. In this respect ECHR pays attention to the fact that for example justice officials especially judges are more vulnerable with regard to the criticism affecting them personally. Therefore, although the freedom of debating public affairs must be granted to a wide scale in relation to judicial judgements, too, the ECHR 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 [ECHR, *De Haas and Gijsels v. Belgium* (19983/92), 27 February 1997, paragraph 37].

The Constitutional Court underlined that although the above arguments had been elaborated in most cases by the ECHR primarily in the context of the criminal law limitations over the freedom of speech, it applied them accordingly also with regard to legal consequences that emerged in other branches of the law, too. 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* [ECHR, *Wabl v. Austria* (24773/94), 21 March 2000 and ECHR, *Jerusalem v. Austria* (26958/95), 27 February 2001, and ECHR, *Print Zeitungsverlag Gmbh. v. Austria* (26547/07), 10 October 2013]. Accordingly, the special protection of the freedom of political speech is a requirement in the judicial practice of ECHR 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.

2.2. The Constitutional Court also notes that the constitutional arguments about the enhanced protection of opinions expressed in public debates – and the related wider possibilities of criticising public figures – are concepts commonly shared by all developed democratic countries. To demonstrate this, after the detailed presentation of the case law of the ECHR to be followed by Hungary, the Constitutional Court makes a short reference to the practice of the Supreme Court of the United States (hereinafter: "Supreme Court").To find a balance between the protection of reputation and the freedom of speech, the Supreme Court elaborated a set of criteria taking into account both the status of the injured person and the public character of the challenged speech. The Constitutional Court lists the principles of this system of criteria.

According to the fundamental test developed by the Supreme Court in the *New York Times v. Sullivan* case, the payment of damages can only be constitutionally awarded because of a libelling statement related to the official activity of a public official if the malicious intention of the libelling person can be proved, i.e. they were aware of the fact that their statement contained a false fact or they were unaware of its falseness because of showing serious negligence in the course of examining the reliability of it. This test is based on a constitutional argument stating that public debates should be undisturbed, firm and open. [376 U.S. 254 (1966)].

Later the Supreme Court extended the New York Times-standard to all statements made in relation to candidates to public offices and all to public figures in general. As justified in the *Gertz v. Welch* case, public officials and public figures usually enjoy significantly greater

access to the channels of effective communication, and on the other hand they put themselves voluntarily in the public spotlight implying a greater risk of being targeted by statements injuring their reputation. In this respect the 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 a free debate [418 U.S. 323 (1974)].

From the complex set of criteria elaborated by the Supreme Court the Constitutional Court points out the element of emphasizing the public nature of the concerned statement in addition to the public figure status of the affected person when defaming statements are assessed, thus even the cases that fall outside the scope of public appearances do not belong to the same group. The Supreme Court shall apply a different test when a private individual is offended in the context of debating public issues or when the same individual's reputation is being injured in a case not related to public interest. As explained in the reasoning of the *Dun & Bradstreet v. Greenmoss Builders* case, 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.

1. The Constitutional Court then interpreted the freedom of speech and the freedom of the press enshrined in Article IX of the Fundamental Law by taking into account the principles contained in its earlier judicial practice also presented in the case law of ECHR and commonly shared by the developed democratic countries.

1.1. The right to the freedom of speech enjoys a special place in the system of fundamental rights contained in the Fundamental Law. This particular role of the freedom of expression is justified in a twofold manner: this right is especially valuable with regard both to the individuals and to the community. The freedom of speech is on the one hand 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, the freedom of speech is a fundament of a democratic and pluralist society and public opinion.There is no democratic public opinion and no State under the rule of law without the freedom and the diversity of social and political debates. The democratic public opinion requires that all citizens of the society should be free to express their thoughts to become formers of the public opinion. Guaranteeing a wide freedom of speech leads to the intellectual enrichment of the community as false and wrong views can only be filtered out in open public debates. Therefore the State must watch over the pluralism of views not only for securing the subjective right of the freedom of speech but also for the formation and maintaining the democratic public opinion.

The freedom of the press – encompassing the freedom of all media types – is an institution of the freedom of speech. Press is first and foremost – along with being engaged in more and more complex and diversified activities – an instrument for expressing opinions, forming the opinion and for gathering information necessary for developing one's opinion. The exceptional character of the freedom of speech is in this respect applicable to the freedom of the press as well, just as the twofold justification of this freedom: the importance of the freedom of the press is justified both by being a subjective fundamental right and a constitutional institution of the democratic public opinion. Accordingly Article IX para. (2) of

the Fundamental Law not only acknowledges the freedom of the press but it also provides about securing the conditions of free information necessary for the development of democratic public opinion.

The Constitutional Court stressed that the two types of justifications and contents of the freedom of speech and the freedom of the press, i.e. the subjective side focusing on individual self-expression and the institutional side centred upon the democratic public opinion are constitutional aspects mutually complementing and supporting each other rather than competing, even less mutually weakening arguments. Either side may enjoy primacy from time to time, but altogether they reinforce each other – even in a very concrete way with regard to certain constitutional questions. The collision of the freedom of speech with the personality protection of public figures is beyond doubt one of these constitutional questions.

1.2. The special role of the freedom of speech implies that, on the one hand, it can only be restricted exceptionally by other rights or constitutional values, and, on the other hand, the Acts restricting the freedom of speech must be interpreted in the narrow sense. "The laws restricting the freedom of expression are to be assigned a greater weight if they directly serve the realisation or protection of another subjective fundamental right, a lesser weight if they protect such rights only indirectly through the mediation of an »institution«, and the least weight if they merely serve some abstract value as an end in itself (public peace, for instance)" [CCDec 1, ABH 1992, 167, 178]. In the restrictions the double – mutually reinforcing – justification of the 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" [CCDec 1, ABH 1992, 167, 172]. The principles applicable to the restriction of the freedom of speech are also applied to the freedom of the press, but they have to be enforced by taking into account the particular characteristics of the operation of the press.

Despite of the special role of the freedom of speech, the high constitutional rank of human dignity can justify the restriction of the earlier by the latter. The text of Article IX para. (4) of the Fundamental Law made it clear as well. It is therefore beyond doubt that in a given case human dignity enjoys primacy over the freedom of speech. However, in accordance with the general rule on the restriction of fundamental rights specified in Article I para. (3) of the Fundamental Law, in such cases the constitutional question is whether the restriction of the freedom of speech by human dignity can be considered necessary and proportionate. Clearly the restriction of the freedom of speech should not be justified by all and any relationship between the given regulation and human dignity. In a case to the contrary the contents of the freedom of speech could be emptied as human dignity and the rights resulting from it are found to be in a closer or more distant relationship with a very wide range of legal provisions. The right to human dignity is only unrestrictable as the legal determinant of human status, while the general personality right and the resulting personality rights thereof can 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.

Accordingly the Constitutional Court has to examine whether – on the basis of the constitutional concerns raised in the concrete case – the restriction of the freedom of speech can be justified in the protection of human dignity. During this examination the Constitutional Court has to pay attention also to the fact that certain rights stemming from human dignity are protected in individual provisions of the Fundamental Law. Article VI para. (1) of the Fundamental Law provides constitutional protection for the right to have one's private life and reputation respected.

1.3. The freedom of expressing one's opinion about public affairs falls into the innermost realm of protection in the context of the freedom of speech and the freedom of the press as the double justification of the freedom of speech is applicable to it with a special force and unambiguity. From the aspect of the freedom of individual self-expression, speaking in the matters of the community – thus the active participation in the developments of the society – is one of the most important fields of evolving one's own personality.On the basis of the community aspects of having a democratic public opinion and the formation of will, the most determining requirement is the free expressing of diverse social and political views.

Despite of emphasizing the importance of expressing opinions in public affairs, other types of expressions are also subject to the considerations explained by the Constitutional Court about the exceptional rank of the freedom of opinion as a fundamental right, and it also implies that these considerations are to be enforced with a special rigour in the case of restricting speeches related to politics and public affairs in general.

Expressing opinions in public debates and the related protection is focused on the fact that the opinions have been expressed with regard to a social or political questions rather than the status of the speaking person concerned. Accordingly the constitutional concerns about public speaking can be applied in a scope wider than the scope of opinions affecting the persons exercising public authority or public officials, and, on the other hand, 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.

Speaking about public figures is nevertheless a central element of expressing political opinion. Making statements about the activities, views or the credibility of the persons who form the public life is an essential element of discussing public affairs. In a significant part of social and political debates the public figures and others who participate in public debates criticise – typically by using the press – each other's views, political performance and – in this context – also the personality of the other person. It is a constitutional mission of the press to control those who exercise public authority, and it is the essential element of this control to present and to criticise – even in a very strong tone – the activities of the individuals and institutions who participate in the formation of public affairs. Accordingly, despite of the fact that expressing opinions in public life focuses on the public affairs themselves and not the public figures, the vast majority of the speeches related to the personality of public figures necessarily and inevitably falls into the category of protected political expression. Consequently the paramount constitutional importance of debating public affairs implies that, in the field of protecting the personality of public figures, a narrower restriction of the freedom of speech and the freedom of the press is considered to comply with the requirements deductible from the Fundamental Law. It is a particularly important constitutional interest that the citizens and the press should be able to participate in social and political debates without uncertainty, opportunism or fear. It would be against this interest if those who speak in public affairs had to be afraid of the legal consequences resulting from the protection of the personality of public figures. (CCDec 2., ABH 1994, 219, 229). In addition to criminal liablity, these requirements are applicable with regard to the consequences under civil law, too. The wide range of the possible payment of damages – in the system of the new Civil Code: indeminifaction payment – could also be a significant factor deterring from participation in public debates.

1.4. The freedom of speech also covers value judgements that reflect the individual's personal conviction disregarding the value content of the opinion, the false or true nature of it or whether it is respectable or not. Expressions containing the statement of facts are also part of the freedom of speech. On the one hand, the communication of certain facts can express a personal opinion, and on the other hand the forming of opinions would become impossible

without communicating facts. In the course of drawing the limitations on the freedom of speech and the freedom of the press it is justified, however, to make a distinction between the protection of value judgements and of the statements of facts (CCDec 2, ABH 1994, 219, 230). While in the case of opinions the proving of falseness would be difficult to deal with, facts that can be proven to be false do not enjoy constitutional protection.

The enhanced protection of expressing political opinions is applicable both to the value judgements worded in public matters and to the statements of facts 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 making the flow of public debates 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.

2. The Constitutional Court then examined the compliance of the regulation challenged in the petition with the constitutional requirements detailed above.

According to Section 2:44 of the new Civil Code, exercising the fundamental rights guaranteeing the freedom of debates about public affairs may restrict on the basis of acknowledgeable public interest – to the necessary and proportional extent – the protection of the personality rights of a public figure without injuring 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 public figures. Based on this legal foundation, the courts shall have a possibility to elaborate the detailed standards of acceptable criticism in the case of public figures. With account to the complex set of criteria applicable to such questions, there is no single statutory standard to be applied mechanically in each case for resolving the collision between the freedom of political opinion and the protection of personality rights, therefore it is the duty of those who apply the law to weigh the relevant circumstances. The enhanced protection of expressing social and political opinions in the context of public affairs should always be taken into account in this process. The new Civil Code specifies three criteria for the weighing, the conditions of restricting the protection of the personality right of a public figure are the following: it must happen on the basis of acknowledgeable public interest, it must be necessary and of proportionate extent, and it should not violate human dignity. According to the interpretation of the regulation, the exercising of the freedom of speech depends on complying with three additional conditions at the same time, if the protection of a public figure's personality rights is at stake.

In the present case the Constitutional Court can – in a procedure of abstract normative control – examine whether these weighing criteria are *in abstracto* in compliance with the requirements deductible from the Fundamental Law. Developing and refining the judicial practice in accordance with the freedom of speech within the limits of the constitutional weighing criteria is *in concreto* the duty of the courts, and the Constitutional Court can exercise constitutional control over this process in the framework of its other competences.

Although the commissioner for fundamental rights challenged only one of the provisions of the new Civil Code, the condition of "acknowledgeable 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 examined the petition with regard to all the three conditions. The wording of the new Civil Code approaches the issue from the side of protecting the personality rights, speaking about the possibility of

restricting the protection of the personality rights of public figures, at the same time the Constitutional Court evaluated the concerned conditions from the aspect of enforcing the freedom of speech and the freedom of the press. In this respect, by setting the conditions of restricting personality rights, the legislator delimited the boundaries of enforcing the freedom of speech and the freedom of the press, which must comply with the constitutional requirements on restricting fundamental rights as specified in Article I para. (3) of the Fundamental Right.

Accordingly the Constitutional Court establishes that the protection of personality rights stemming from human dignity can result in restricting the freedom of speech even in the case of public figures – to a narrower extent than in the case of other individuals. Consequently, with account to Article II of the Fundamental Law safeguarding human dignity and to Article VI para. (1) providing respect to the private life and the reputation of persons, the necessity to restrict the freedom of speech and the 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. At the same time the Constitutional Court had to examine whether the concrete conditions contained in the provision are in compliance with the constitutional requirements of the restriction [Article I para. (3)].

2.1 According 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 public figure "to the necessary and proportional extent". According to the Constitutional Court, the primacy of the freedom of speech is the concretisation of Article I para. (3) of the Fundamental Law prescribed for the judiciary and it is also in line with the requirements deductible from Article IX of the Fundamental Law, according to which the collision of the freedom of speech 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 – although it is linked to general terms used in constitutional law rather than in private law – provides the necessary and sufficient margin for the judiciary to elaborate the standards for setting the limits of expressing political opinions.

The judiciary must take into account first and foremost the fact that since public affairs themselves and not the public figures can be found in the focus of the freedom of political speech, all speeches related to public affairs are under extra protection, thus restricting the protection of the personality rights of the persons affected by them. It means that the restricted character of the protection of personality rights applies not only to those who are professionally engaged in public appearance, as the debating of public matters can affect a wider scope of individuals in the framework of a concrete debate in the society. However, the status of the persons affected by the speech must also be taken into account: in the case of persons exercising public authority and of politicians who are public figures, the restricted nature of the protection of their personality rights is considered "necessary and proportionate" to a wider extent than in the case of any other person. On the one hand, it was their own decision to become more active formers of public affairs than others do, thus undertaking being evaluated and criticised before the publicity of the affected community, therefore – in the scope of debating public affairs – they have to tolerate with more patience the expressions of opinions affecting or qualifying them or offending their personality. On the other hand, those who exercise public authority and the politicians acting publicly can defend themselves against any offence as they have access to the means of mass communication in a wider extent and with much more efficiency than anyone else. Thirdly any criticism and qualification about their personality are handled differently by the public, regarding it as a necessary element of democratic debates, typically as a piece of information to be interpreted in the framework of different political interests. In the past period of time in Hungary the

operational features of plural political publicity have been developed, thus the society is capable of interpreting with due circumspection the expressions made in the course of public debates.

When 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 wider: for example, due to the regulations pertaining to their service relation, judges are not in a position to defend themselves against the offences in public, therefore due account must be paid to prevent the undermining of 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.

By taking into account all the above, the term "to the necessary and proportional extent" 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 public figures.

2.2. According to the new Civil Code, the boundaries of the 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 public figures. The Constitutional Court holds that this condition in itself is also compatible with Article IX of the Fundamental Law as human dignity can be a limit over the freedom of speech. In accordance with the constitutional concerns manifested in this condition set by the new Civil Code, in a certain scope, the human dignity of public figures also needs to be protected against the 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 concrete cases – i.e. in the course of personally enforcing claims for the protection of specific personality rights or the general personality right – when the freedom of speech must withdraw to pay respect to the human dignity, the private life or the reputation of a public figure. The unrestrictable aspect of human dignity contained in Section 2:42 of the new Civil Code can only be regarded as an absolute limit on the freedom of speech only in a very narrow scope of opinions expressed that negate the foundations of human status.

In this respect the Constitutional Court holds applicable in the case of liabilities under civil law as well that in a democratic State under the rule of law, the free criticism – let it be of even very hard toned 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, in the opinion of the Constitutional Court, 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 build civil law liability upon it. 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 debating of public affairs. The Constitutional Court refers again to the fact that the arguments supporting the lack of legal accountability can become weaker with regard to certain persons exercising public authority, for example judges, and it may result – by way of derogation 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 debates.

The Constitutional Court is stressing that all the above shall not result in emptying out the protection of the human dignity, private life and the reputation of the affected persons – with

reference to the relevant condition found in the new Civil Code. Also the persons who exercise public authority and the politicians who act in public are entitled to the protection of their personality rights if the value judgements about their personality refer to their private or family life rather than to the debating of public affairs and to their public activities. 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 unrestrictable aspect of human dignity enshrined in Article 2:42 of the new Civil Code rather than the personality rights specified in Section 2:42. Moreover, with account to what has been detailed above, public figures may also seek legal remedy against false statements of facts.

Further limits of the freedom of speech to be set with regard to the protection of human dignity in the context of debating public affairs – for example in the case of having other affected persons – should also be elaborated in the judicial practice.

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 debates, in particular the freedom of speech and the freedom of the press, by specifying that the restriction of the protection of the personality rights of public figures could only happen "on the basis of acknowledgeable public interest". The Constitutional Court established that this condition was an unjustified restriction of the freedom of speech and the freedom of the press, thus violating Article IX paras (1) and (2) of the Fundamental Law.

In line with the constitutional character of expressing opinions in public matters, exercising the freedom of speech in the interest of having free social debates is not only an "acknowledgeable public interest" in each and every case, but it is also a constitutional interest of paramount importance. Accordingly, restricting the protection of the personality rights of public figures for the purpose of guaranteeing the exercising of the freedom of speech is in each case a constitutional interest and requirement. Therefore there is no need for justifying any further indescribable "public interest" still less the "acknowledgeable" nature of this public interest for the purpose of opening a possibility for criticising public figures to an extent significantly wider than in case of others. This condition of the new Civil Code would narrow down in an unjustified way the scope of the freedom of speech, as criticising public figures 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.

Public interest in itself is deemed important by the Fundamental Law in the context of only 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 para. (3) of the Fundamental Law], a fundamental right – such as the freedom of speech – can only be restricted in the interest of enforcing another fundamental right or the protection of a constitutional value. As the "acknowledgeable public interest" not detailed and not specifically defined in the new Civil Code does not fall into this category, it is a condition stepping beyond the limits set by Article I para. (3) of the Fundamental Law.

The statutory condition of "acknowledgeable public interest" is unjustified despite of 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 collision of the freedom of speech and the protection of the personality rights of public figures. 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 there is no constitutional way for the judiciary to assess the existence of further conditions. The constitutional aim of the rule contained in Section 2:44 is to set the limits of the freedom

of speech affecting public figures by taking into account Article II and Article VI para. (1) of the Fundamental Law. While the terms “to the necessary and proportional extent” and “without injuring human dignity” closely link the limits of exercising the freedom of speech to the protection of the personality rights of the public figure affected, the term “acknowledgeable public interest” would extend the potential scope of restrictions over the aspects of the protection of personality rights.

To sum up, the term “acknowledgeable public interest” would raise an additional condition for the exercising of the freedom of speech in political and public matters that could not be justified constitutionally, thus restricts unnecessarily the freedom of speech and the freedom of the press guaranteed in Article IX paras (1) and (2) of the Fundamental Law. On the basis of all the above, the Constitutional Court annulled the text “on the basis of acknowledgeable 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 the Decision of the Constitutional Court in the Hungarian Official Gazette is based upon Section 44 para. (1) of the Act on the Constitutional Court.

Budapest, 3 March 2014

Dr. Péter Paczolay
President of the Constitutional Court
Judge of the Constitutional Court, Rapporteur

Dr. Elemér Balogh
Judge of the Constitutional Court

Dr. István Balsai
Judge of the Constitutional Court

Dr. András Bragyova
Judge of the Constitutional Court

Dr. Egon Dienes-Oehm
Judge of the Constitutional Court

Dr. Imre Juhász
Judge of the Constitutional Court

Dr. László Kiss
Judge of the Constitutional Court

Dr. Péter Kovács
Judge of the Constitutional Court

Dr. Barnabás Lenkovics
Judge of the Constitutional Court

Dr. Miklós Lévay
Judge of the Constitutional Court

Dr. Béla Pokol
Judge of the Constitutional Court

Dr. Péter Paczolay

Dr. László Salamon
Judge of the Constitutional Court

President of the Constitutional Court
on behalf of
Dr. István Stumpf
Judge of the Constitutional Court
hindered in signing

Dr. Péter Szalay
Judge of the Constitutional Court

Dr. Mária Szívós
Judge of the Constitutional Court