Decision 57/2001 (XII. 5.) AB

IN THE NAME OF THE REPUBLIC OF HUNGARY

On the basis of a motion submitted by the President of the Republic aimed at the preliminary constitutional review of certain provisions of an Act of Parliament adopted but not yet promulgated, the Constitutional Court – with concurring reasoning by dr. Mihály Bihari, Judge of the Constitutional Court, and dissenting opinions by dr. Ottó Czúcz, dr. András Holló, dr. László Kiss and dr. István Kukorelli, Judges of the Constitutional Court – has adopted the following

decision:

The Constitutional Court holds that the manner of regulating the right of reply as determined in the new paragraph (2) introduced by Section 1 of the Act of Parliament adopted at the session of the Parliament on 29 May 2001 to Section 79 of Act IV of 1959 on the Civil Code is unconstitutional.

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

Reasoning

I

1. On the basis of Article 26 para. (4) of the Constitution, the President of the Republic did not sign the Act of Parliament adopted at the session of the Parliament on 29 May 2001 (hereinafter: the CCAm) on the amendment of Act IV of 1959 on the Civil Code (hereinafter: the CC) but forwarded it to the Constitutional Court for examination. With reference to Section 1 item a), Section 21 para. (1) item b) and Section 35 para. (2) of Act XXXII of 1989 on the Constitutional Court (hereinafter: the ACC), the President of the Republic proposed that the Constitutional Court examine the provisions in Sections 1 and 2 of the CCAm objected to.

The petition contains the following statement:
“In my opinion, the above mentioned Act forwarded for promulgation is unconstitutional as far as its part in Section 1 providing for Section 79 para. (2) and Section 79 para. (3), and its part in Section 2 providing for the last sentence in Section 84 para. (2), of Act IV of 1959 on the Civil Code are concerned.”

The petitioner claimed the contested regulations to be in violation of the following provisions of the Constitution:
“In my opinion, Section 79 paras (2) and (3) of the CC in their parts related to the right of reply as introduced by Section 1 of the CCAm violate the freedom of the press guaranteed in Article 61 para. (2) of the Constitution, and the last sentence in Section 84 para. (2) of the CC as introduced by Section 2 of the CCAm violates the principle of the rule of law declared in Article 2 para. (1) of the Constitution while also violating the freedom of expression and the freedom of the press guaranteed in Article 61 paras (1) and (2) of the Constitution.”

As far as the provisions of the CCAm are concerned, several persons have turned to the Constitutional Court presenting their arguments despite not being entitled under Section 21 para. (1) of the ACC to submit a petition for constitutional examination concerning the provisions of an Act of Parliament adopted but not yet promulgated. These submissions are not independent petitions, therefore the Constitutional Court has not adopted a decision on them.

2. When examining the issue, the Constitutional Court drew on the following provisions of the Constitution:

"Article 2 para. (1) The Republic of Hungary is an independent democratic state under the rule of law."

"Article 8 para. (1) The Republic of Hungary recognises inviolable and inalienable fundamental human rights. The respect and protection of these rights is a primary obligation of the State.

(2) In the Republic of Hungary regulations pertaining to fundamental rights and duties are determined by law; such law, however, may not restrict the basic meaning and contents of fundamental rights."

"Article 54 para. (1) In the Republic of Hungary everyone has the inherent right to life and to human dignity. No one shall be arbitrarily denied of these rights."

"Article 59 para. (1) In the Republic of Hungary everyone has the right to the good standing of his reputation, the privacy of his home and the protection of secrecy in private affairs and personal data."

"Article 61 para. (1) In the Republic of Hungary everyone has the right to freely express his opinion, and furthermore, to have access to, and distribute information of public interest.

(2) The Republic of Hungary recognizes and respects the freedom of the press."

The annex to the petition contains the text of the Act of Parliament. The provisions objected to – together with the related regulations to be reckoned with in the assessment – are the following:

"Act …of 2001 on the amendment of Act IV of 1959 on the Civil Code

Section 1

Section 79 of Act IV of 1959 on the Civil Code (hereinafter: the CC) shall be replaced by the following provision:

'Section 79 para. (1) If a daily newspaper, a magazine (periodical), the radio or the television publishes or disseminates false facts or distorts true facts about a person, the person affected shall be entitled to demand, in addition to other actions provided by law, the publication of an announcement identifying the false or distorted facts and indicating the true facts (rectification).

(2) If any opinion or evaluation published in a newspaper, a magazine (periodical), the radio or the television violates the inherent rights of a person, he may – in addition to other actions provided by law – demand the publication of his own opinion or evaluation (reply).

(3) The rectification or reply shall be published within eight days of receipt of the relevant demand in the case of daily papers, in the next issue of a magazine (periodical), in the same manner, and in the case of the radio or the television, within eight days, at the same time of the day as the time of broadcasting the objectionable communication.'

Section 2

Section 84 para. (2) of the CC shall be replaced by the following provision:

'(2) If the amount of damages that may be imposed is disproportionate to the gravity of the actionable conduct, the court shall also be entitled to penalise the perpetrator by ordering him to pay a fine usable for public purposes. If the violation of rights was performed through a daily paper, magazine (periodical), the radio or the television, the court shall also order the perpetrator to pay a fine usable for public purposes. The amount of the fine usable for public purposes shall be fixed at a level suitable for preventing the perpetrator from committing further acts of violation.'

Section 3

The following Section 346/A shall be added to Act III of 1952 on the Code of Civil Procedure:

'Section 346/A The rules of procedure for rectification in the press shall be applied appropriately to the procedure for publishing a reply (Section 79 paras (2)-(3) of Act IV of 1959).'

Section 4

This Act shall enter into force on the 8th day following its promulgation; its provisions shall apply to infringements committed after its entry into force."

II

1. In assessing the unconstitutionality of the provisions objected to in the petition, the Constitutional Court first examined the challenged rule on the right of reply.

The rules on the right of reply challenged in the petition amend Section 79 of the Civil Code. The amended rules are placed in the Act in the Chapter on inherent rights and intellectual property rights. The civil law rules on the inherent rights are related to the "general personality right" manifested as a mother right at the level of constitutional law, and they serve the enforcement thereof. The "general personality right" manifests itself in several rights also at the level of constitutional law, with one of its designations being the right to human dignity [Decision 8/1990 (IV. 23.) AB, 1990, 42, 44-45]. The rules on the right of reply are connected to the right to human dignity declared in Article 54 para. (1) of the Constitution and to the right to the good standing of one's reputation granted under Article 59

para. (1) of the Constitution, and they may play a role in the enforcement of these fundamental rights through the provisions of civil law.

2. In assessing the rule objected to, the next question examined by the Constitutional Court was on what terms a fundamental right may be restricted. According to the petition, the rules on the right of reply violate the freedom of the press guaranteed in Article 61 para. (2) of the Constitution, as they constitute, contrarily to the exercise of a fundamental right, the application of a tool which results in a significant violation of rights and which is suitable only to a very limited extent for achieving the desired objective, and therefore such rules are considered to disproportionately restrict a fundamental right. Although the petition only claimed the violation of the freedom of the press, in the basic evaluation of the general aspects, the Constitutional Court took into account the freedom of expression, too, as a fundamental right also protected on the basis of Article 61 of the Constitution, and considered in the practice of the Constitutional Court to be "the 'mother right' of communication rights and the origin of the fundamental right to the freedom of the press as well" [Decision 37/1992 (VI. 10.) AB, ABH 1992, 227, 229], and therefore the two fundamental rights are closely related to each other.

After declaring the respect for the fundamental rights, Article 8 of the Constitution provides in its paragraph (2) that the rules pertaining to the fundamental rights shall be determined in Acts of Parliament. The above provision also sets the limits of the contents of statutory regulations: the essential contents of a fundamental right may not be limited even by an Act of Parliament. In the interpretation of Article 8 of the Constitution, it was stated in Decision 20/1990 (X. 4.) AB – after the amendment of the Constitution in June 1990 – that a fundamental right may only be restricted when it is necessary, and when there is a balance between the importance of the objective desired to be achieved by way of the restriction and the gravity of the injury caused to the fundamental right (ABH 1990, 69, 71).

According to Article 8 para. (1) of the Constitution, the State is obliged not only to respect the fundamental rights but to protect them as well. According to Decision 64/1991 (XII. 17.) AB, the State shall guarantee the statutory and institutional conditions needed for the realisation of fundamental rights, taking into account its duties related to other fundamental rights and its other constitutional duties. The legal order to be established shall render possible the most favourable enforcement of each fundamental right as well as the harmony of fundamental rights (ABH 1991, 297, 302-303). As far as the right to the freedom of expression is concerned, Decision 30/1992 (V. 26.) AB argued on the basis of the above that Article 61 of the Constitution not only guarantees the right to individual freedom of expression but it also imposes "the duty on the State to secure the conditions for the creation and maintenance of democratic public opinion". Compliance with this obligation necessitates the inclusion of the freedom of expression among other protected values (ABH 1992, 167, 172). Following the above reasoning, the decision referred to above deals with the restriction of the freedom of expression and the freedom of the press in cases where the exercise of these freedoms constitutes raising hatred against specific groups of people. If such exercise of rights received constitutional protection instead of being restricted, a contradiction would be formed between such protection and – among others – the constitutional protection of people's equality and dignity. The Constitutional Court declared on the above ground that "the protection of human dignity may necessitate the restriction of the freedom of expression" (ABH 1992, 167, 173-174). As far as the protection of the freedom of expression by means of criminal law is concerned, it was furthermore established by the Constitutional Court in Decision 36/1994 (VI. 24.) AB that "however, human dignity, honour and reputation, which

are constitutionally protected, may constitute the outer limit of the freedom of expression realised in value judgements, and, if it is for the protection of human dignity, honour and reputation, the enforcement of criminal liability may not be generally considered disproportionate, and thus unconstitutional (ABH 1994, 219, 230). Decision 33/1998 (VI. 25.) AB also established that the freedom of expression may be restricted for the purpose of protecting human dignity and the right to the good standing of one's reputation declared under Article 59 para. (1) of the Constitution (ABH 1998, 256, 260).

Therefore, in respect of the constitutional concern raised in the petition it can be established on the basis of the Constitutional Court's practice that the restriction of the freedom of the press in general is not contrary to the Constitution if such a provision is necessary and the importance of the desired objective is proportionate to the injury caused to the fundamental right, and that the State obligation to protect another fundamental right may constitute a ground for restricting the freedom of the press.

3. In the practice of the Constitutional Court [even as early as the date of adoption of Decision 23/1990 (X. 31.) AB, ABH 1990, 88, 93], the international obligations undertaken by Hungary in international treaties have played a decisive role in the examination of the restriction of fundamental rights. Furthermore, Decision 30/1992 (V. 26.) AB established the following: "The necessity of restricting the freedom of expression and the freedom of the press also follows from the international obligations of the Republic of Hungary" (ABH 1992, 167, 174).

In the assessment of the present case, the Constitutional Court considers the following provisions of international treaties to be relevant:

a/ The freedom of expression and the freedom of the press was declared in Article 19 para. (2) of the International Covenant on Civil and Political Rights adopted at session XXI of the General Assembly of the United Nations on 16 December 1966 and promulgated in Hungary in Law-Decree 8/1976 (hereinafter: the Covenant). According to paragraph 3, these freedoms may be restricted for the purpose of respecting the rights or reputation of others.

b/ Article 10 para. (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and promulgated in Hungary in Act XXXI of 1993 (hereinafter: the Convention) guarantees that everyone has the right to the freedom of expression (including the freedom of the press). Pursuant to paragraph (2), the exercise of this right may be restricted for the purpose of protecting the rights or reputation of others. Pursuant to Article 17 of the Convention, nothing in the Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Consequently, both the Covenant and the Convention protect honour and reputation, and allow the restriction of the freedom of expression and the freedom of the press in the interest of protecting one's reputation.

4. However, the decisions of the Constitutional Court respected not only the rules prescribed in the Covenant and the Convention, but they took into account the principles developed in the practice of the European Commission of Human Rights (hereinafter: the

Commission) and the European Court of Human Rights (hereinafter: the Court) as well; this is true of all decisions on the freedom of expression and the freedom of the press.

In interpreting the Convention, the Court declared a principle that has been applied as a guideline ever since, namely that the States must use the international standard specified in the Convention (Case "Relating to certain aspects of the laws on the use of languages in education in Belgium", Decision of 9 February 1967, Series A, no. 5, p. 19). With due regard to the particular features of the period of time and the location concerned, the States may impose rules restricting the exercise of rights defined in the Convention, but such rules may not violate the essential contents of the rights in question; for the purpose of the effective protection of human rights, the Convention contains general rules that create an appropriate balance between public interest and the protection of human rights [Case "Relating to certain aspects of the laws on the use of languages in education in Belgium" (merits), Decision of 23 July 1968, Series A, no. 6, p. 32, para. 5].

The Court has passed several decisions in respect of the freedom of expression and the freedom of the press. As stated in one of the decisions, the freedom of expression is one of the cornerstones of a democratic system. This freedom also covers the expression of opinions which offend or disturb the State or some part of the population (Case Handyside, Decision of 7 December 1976, Series A, no. 24, p. 23, para. 49, Sunday Times v. The United Kingdom, Decision of 26 April 1979, Series A, no. 30, p. 40, para. 65). According to the Court, the scope of exceptions from the principle of the freedom of expression shall be interpreted strictly [Case Sunday Times v. The United Kingdom (no. 2), Decision of 26 November 1991, Series A, no. 217, p. 29, para. 50]. The Court also pointed out that the freedom of the press means, among others, the community's right to receive adequate information (the Sunday Times Case referred to above, p. 41, para. 66).

5. The American approach has had a significant impact on the development of the Court's practice. Originally, the Constitution of the USA had not provided for the freedom of expression; the first amendment to the Constitution containing, among others, provisions on the freedom of expression and the freedom of the press was adopted in 1791 in the interest of restricting the power of the federal government. As pointed out by American scholars of constitutional law, the interpretation of the rules has significantly changed over time. The fundamental principles of the approach prevailing in the USA today were declared by the Supreme Court of the United States in a decision passed in 1964 in the Case New York Times Co. v. Sullivan. In this case, at the time of clashes fuelled by racial discrimination, an Alabama court imposed the payment of damages in the amount of USD 500,000 on a company publishing a newspaper which contained in the form of a paid advertisement a protest against the handling of racial affairs by the public administration authorities of a certain town in the State of Alabama, and the protest contained false statements defaming one of the town's public servants. The Supreme Court of the United States changed the decision of the Alabama court on the payment of damages, and pointed out the importance of the role played by the press. It emphasised the significance of the possibility of receiving information from various sources of completely different characters. Imposing punitive damages on the basis of the presumption of deliberateness and on the grounds of a false or offending opinion criticising public administration would be contrary to such role. Such a legal approach would result in refraining from the expression of one's opinion. Despite probable exaggerations, abuses and false statements, the freedom of expression is, in the long term, essential to the development of well-informed public opinion in a democracy (376 US 254 11 L ed 2d 686, pp. 699, 700-702, 708).

As far as the principles are concerned, the European practice is similar to the main elements of the American judicial practice. However, the European legal approach shows significant differences in comparison with the American one, as the Convention expressly provides for various cases of restricting the freedom of expression and the freedom of the press; in addition, European statutes do not provide for punitive damages as applied in American law – both features have a decisive effect on the basic character of regulation. Moreover, in the American practice there are elements no longer found in the decisions of the Court. This way, it is related to the principle of the freedom of expression as enforced in the American practice that the courts did not deem it possible to prevent a Nazi demonstration in a neighbourhood where persons who had been victims of the holocaust lived, and that they did not see any possibility for action against the burning of a cross reminiscent of the Ku-Klux-Klan in front of the house of an Afro-American family [Cases National Socialist Party v. Village of Skokie 432 US 43 (1977), National Socialist Party v. Village of Skokie 434 US 1327 (1977); RAV v. City of St. Paul, Minnesota 120 L. Ed. 2d 305 (1992)].

Deviations from the American practice are also justified by the fact that not only Article 10 para. (2) of the Convention – as referred to above – but also Article 17 thereof applies to the restriction of the freedom of expression. The Commission decided on the basis of Article 17 of the Convention that persons aiming to introduce dictatorship and to annul the rights guaranteed in the Convention shall not be entitled to refer to the rights specified under Articles 9, 10 and 11 of the Convention. Another reference to Article 17 was made by the Commission in assessing a complaint in the case of which it established racial discrimination and incitement, and therefore established the well-founded nature of restricting the freedom of expression (Cases KPD v. Germany, Decision 250/57 and Glimmerveen and Hagenbeek v. The Netherlands, Decision 8348/78, see J.A.Frowein, W.Peukert, EMRK-Kommentar, Kehl-Straßburg-Arlington, 2. Aufl. 1996. p. 492). The Court took a similar position when establishing that the protection guaranteed in Article 10 of the Convention was not applicable to the expression of racist opinions (Case Jersild v. Denmark, Decision of 23 September 1994, Series A no. 298, para. 35, Bírósági Határozatok (Court Reports) 1996/6, pp. 473-477), and that pro-Nazi policy may not be protected under Article 10 as it means statements against the fundamental values of the Convention (Case Lehideux and Isorni v. France, Decision of 23 September 1998, Bírósági Határozatok Emberi Jogi Füzetek (Court Reports Human Rights Booklets) 1999/2 pp. 61-63).

6. In line with the international treaties and the principles developed in the practice of the Court, the Constitutional Court established concerning the potential restriction of the freedom of expression that the freedom of expression enjoys a special status, there are few rights which have priority over it, and if this freedom is statutorily restricted, the restriction shall be interpreted strictly. The freedom of expression guarantees the possibility of communication independently of its contents and without regard to its potentially damaging or offending character. The freedom of expression is constitutionally protected in terms of its interrelation with public opinion developing as determined by its own features, and in terms of the widest possible scale of supplying and obtaining information. The Constitutional Court pointed out with regard to the Hungarian historical situation that political culture and a soundly reacting public opinion may only emerge through free debates and self-cleansing; thus one who uses abusive language stigmatises himself and shall be the subject of criticism. This process should not be interfered into by measures of criminal law or by anything else than high amounts of damages payable [Decision 30/1992 (V. 26.) AB, ABH 1992, 167, 178-180].

This was the basis of the decision passed in 1992 concerning the supervision of public service radio and television as well as the licensing of commercial radio and television stations. The decision pointed out that the press played an important role not only in communicating opinions but in distributing information as well. The freedom of the press is primarily secured by the State's non-interference with the contents of the press or the questions related to the establishment of newspapers. A democratic public opinion may only come about on the basis of the objective and comprehensive dissemination of information. [Decision 37/1992 (VI. 10.) AB, ABH 1992, 227, 229-230].

With reference to and in line with the practice of the Court, the Constitutional Court established that Article 61 of the Constitution does not only guarantee the right to the freedom of expression but it also imposes the duty on the State to secure the conditions for the creation and maintenance of democratic public opinion. Therefore, when setting constitutional limits to the freedom of expression, the indispensable aspects of democracy must also be taken into account [Decision 36/1994 (VI. 24.) AB, ABH 1994, 219, 222-223].

The above mentioned decisions of the Constitutional Court concentrated on the issues of restricting the freedom of expression and the freedom of the press relevant in respect of the democratic system. In this regard, the politically-oriented restriction of these fundamental rights was in focus. However, it is necessary to perform a separate examination of the possibility of restricting the fundamental rights concerned in cases where the freedom of expression and the freedom of the press are restricted, rather than on political grounds, on the grounds of protecting fundamental rights, or the rights, reputation or human dignity of others.

7. There have only been a few cases in the practice of the Constitutional Court where restricting the freedom of expression and the freedom of the press was justified by the protection of the reputation and the human dignity of persons, and such restriction was not related to criticising the State.

a/ Such cases of restriction can be found among the cases submitted to the Court in Strasbourg, belonging to the following groups:

- As far as the protection of reputation is concerned, cases of harming the honour or dignity of politicians, public servants or persons acting in public were assessed in the decisions of the Court separately from other cases of protecting one's reputation. For the purpose of maintaining the freedom of political debates, the Court holds that it is acceptable to criticise politicians in a ruder tone than persons who are not politicians (Case Lingens v. Austria, Decision of 8 July 1986, Series A no. 103, p. 26, para. 42, p. 27, paras 43-44, p. 28, para. 46; similar case: Oberschlick v. Austria, Decision of 23 May 1991, Series A no. 204, Bírósági Határozatok Emberi Jogi Füzetek (Court Reports Human Rights Booklets) 1997/1, p. 51; Case Lopes Gomes da Silva v. Portugal, Decision of 28 September 2000, Bírósági Határozatok (Court Reports) 2001/7, pp. 559-560). Nevertheless, the protection of honour applies to this category of persons as well. The Court pointed out in several decisions that the criticism of persons in official positions may not exceed the limits of acceptable criticism and it may not harm the good standing of one's reputation (Decision of 21 January 1999 passed in the Janowski Case, Reports 1999-I; Decision of 29 February 2000 passed in the Wabl Case, Decision of 27 June 2000 made in the Constantinescu Case, Decision of 4 May 2000 passed in the Jääskeläinen Case, see Case Law Concerning Article 10 of the European Convention on Human Rights, Council of Europe 2001, pp. 62-64).

– In the practice of the Court, on the basis of Article 10 para. (2) of the Convention, judges and courts are treated differently from public actors, public servants, politicians, or institutions of the State, and restricting the freedom of expression and the freedom of the press for the purpose of protecting the reputation and the impartiality of the court is acknowledged (Cases Barfod v. Denmark, Decision of 22 February 1989, Series A no. 149, see Bírósági Határozatok Emberi Jogi Füzetek (Court Reports Human Rights Booklets) 1997/1, pp. 47-48; Prager and Oberschlick v. Austria, Decision of 26 April 1995, Series A no. 313 paras 35-38; Worm v. Austria, Decision of 29 August 1997, R. 1997-V. para. 50, see Bírósági Határozatok Emberi Jogi Füzetek (Court Reports Human Rights Booklets) 1998/4, pp. 6-7).

– In cases where the freedom of expression and the freedom of the press are restricted on the basis of Article 10 para. (2) of the Convention for the purpose of protecting the reputation or the rights of others, the Court takes into account several aspects when making a decision on permitting the restriction. In one of the cases, the decision was based on the examination of the judicial practice concerning damages as well as on the exceptionally high estimated amount of damages (1.5 million pounds) (Case Tolstoy Miloslavsky v. The United Kingdom, Decision of 13 July 1995, Series A no. 316-B, paras 41, 51, and 55, Bírósági Határozatok melléklete (Annex to the Court Reports) 1996/2, pp. 44-46). As far as declarations and announcements made in the business life are concerned, the decisions of the Court have been based partly on the competition rules of the countries concerned and partly on the practices applied in competition law in the countries of Europe (Cases Markt Intern Verlag GmbH and Klaus Beerman v. Germany, Decision of 30 March 1989, Series A no.165, paras 34, 35, and 37; Jacubowski v. Germany, Decision of 23 June 1994, Series A no. 291-A, paras 26-28, Bírósági Határozatok Emberi Jogi Füzetek (Court Reports Human Rights Booklets) 1997/1, pp. 78-81; Hertel v. Switzerland, Decision of 25 August 1998, paras 47-51, Bírósági Határozatok Emberi Jogi Füzetek (Court Reports Human Rights Booklets) 1999/2, pp. 35-37; Commission's report of 8 January 1960, para. 263).

b/ In a decision of the Constitutional Court adopted in 1994, upon the examination of the constitutionality of criminal law regulations, reference was made to the Court's decisions published up to that time, and the Constitutional Court presented a position similar to that of the Court in respect of the criminal offences of defamation and libel committed against politicians. It was established that the freedom of expression may be restricted only to a lesser extent for the purpose of protecting those who exercise public authority than for other purposes. Free criticism of the institutions of the State and local governments is an essential element of democracy. According to the decision of the Constitutional Court, expressing a heated, exaggerated or slanderous opinion on an authority, an official person or a politician acting in public may not be punished as an expression of a value judgement, but the criminal law protection applicable to everyone covers such persons as well when the statement is not related to the person as a politician acting in public. Therefore, when applying the general rule of defamation and libel applicable to the case of any injured party it is a constitutional requirement that the freedom of expression and thus the scope of unpunishable expressions of opinion be wider in the case of persons and institutions exercising public power or politicians acting in public than in the case of other persons [Decision 36/1994 (VI. 24.) AB, ABH 1994, 219, 230-231].

8. In line with the above arguments, concerning the questions examined on the basis of the petition, it can be established on the grounds of Article 8 para. (2), Article 54 para. (1), Article 59 para. (1), Article 61 paras (1) and (2) of the Constitution and on the basis of the practice of the Constitutional Court that the freedom of expression and the freedom of the press may exceptionally be restricted in an Act of Parliament if such restriction does not result

in violating the essential contents of these rights. However, in general, 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. However, the role of protecting democracy played by the freedom of expression and by the press manifests itself to a very limited extent or not at all in cases where one of the business actors – in pursuance of his business interest – makes negative statements about another business actor in public in the course of economic competition; in such cases, there is a wider margin for the restriction of these freedoms. The restriction may be justified by the protection of a fundamental right, and the State's obligation to secure the conditions for the development and for the continuous operation of a democratic public opinion.

9. After the statements that have been made so far about the restriction of the freedom of expression and the freedom of the press, it has to be examined whether or not the right of reply in general and the concrete provision challenged in the petition qualify as constitutionally acceptable restrictions.

The right of reply means the obligation of publishing the reply in the case of a periodical, the radio and the television. Prescribing an obligation to publish communication that would not necessarily be published on the basis of the publisher's free choice is a restriction of the freedom of the press, more specifically of the editor's freedom. This may cause the press to abstain from publishing any opinion in the case of which the possibility of the obligation of publishing a reply could be expected. This way, it is possible for the restriction of the freedom of expression as part of the freedom of the press to occur in an indirect manner. In addition, the obligation to publish a reply puts a burden on the press in the form of costs and loss of profits, therefore the possibility of such a disadvantage may cause the press to abstain from publishing opinions. Consequently, the Constitutional Court holds that the obligation to publish a reply qualifies as restricting the freedom of the press and – indirectly – the freedom of expression as well.

In assessing the necessity and the proportionality of the restriction, it is important to clarify the role of the right of reply. The right of reply together with rectification serves the following purpose: in the case of communication injuring one's human dignity or reputation, the objectionable statement should not be left as the only source of information in the question concerned, and the persons who received information from the original statement should have a chance to gain knowledge of the true facts and of the opinion of the person affected. In addition to protecting reputation and human dignity, one has to take into account that full-scale information supply is also justified by the need to inform the public. In addition to the freedom of expression, the freedom of the press also includes the right to gain information necessary for the formulation of an opinion [Decision 61/1995 (X. 6.) AB, ABH 1995, 317, 318].

As stated in Decision 30/1992 (V. 26.) AB, which is especially important in the present case, "the laws restricting the freedom of expression are to be assigned a greater weight if they directly serve the realisation or protection of another individual fundamental right, a lesser weight if they protect such rights only indirectly through the mediation of an 'institution', and the least weight if they merely serve some abstract value as an end in itself" (ABH 1992, 167, 178). It was pointed out in Decision 36/1994 (VI. 24.) AB that although it is

well justified to distinguish between value judgements and statements of facts when setting bounds to the freedom of expression, “human dignity, honour and reputation, likewise constitutionally protected, may constitute the outer limit of the freedom of expression realised in value judgements, and, if it is for the protection of human dignity, honour and reputation, the enforcement of criminal liability may not be generally considered disproportionate and thus unconstitutional” (ABH 1994, 219, 230). The cited decision acknowledged that the various forms of publications may not only result in harming reputation, but they may also violate human dignity independently from one’s reputation. Accordingly, the right to the freedom of expression and the freedom of the press may come into conflict not only with the right to the good standing of one’s reputation but also with the right to human dignity. The right to human dignity is, in line with the practice of the Constitutional Court since the very beginning of its operation, a fundamental right of very high importance [Decision 23/1990 (X. 31.) AB, ABH 1990, 88, 93].

10. The examination of foreign experience may support the general evaluation of the right of reply. There are many countries with regulations on the right of reply. In France, public servants were empowered in 1819 to have any false statement made about their activities rectified, then, in 1822, this right was granted to everyone. Paragraphs (2) and (3) of Article 13 of the Act on the Press adopted in 1881 and still in force prescribe that periodicals are obliged to publish the reply made by a person named in the publication. According to the law, the injury of rights is not a precondition to the obligation to publish the reply, and there is no difference between the communication of facts or opinions; however, the size of the reply is restricted by the law. The Spanish organic Act 2/1984 follows the French regulatory model. In contrast, since 1874 the German regulations have only granted the right of reply to the person affected in the case of the communication of facts. This principle is still followed by the Acts adopted in the Provinces of the Federal Republic of Germany. However, the right of reply is rather limited both in terms of size and form (Section 11 of the Act of 14 January 1964 on the Press of Baden-Württemberg, Section 10 of the Bavarian Act of 2 December 1964 on the Press, Section 11 of the Act of 24 May 1966 on the Press of Nordrhein-Westphalen etc.). The German Constitutional Court has also dealt with the constitutionality of the right of reply, establishing that the legislature was bound to ensure the protection of one’s personality against the media as well. The right of reply is one of the tools of such protection, and it is also important from the aspect of forming public opinion, as it secures information from many sources (BVerfG Decision of 14 January 1998, Europäische Grundrechte Zeitschrift 1998, pp. 227-234). The relevant provisions of the Swiss Civil Code (Articles 28g-l) apply a method similar to the German model.

Article 14 of the American Convention of Human Rights of 1969 also declares the right of reply under conditions specified by law. Although the USA did not ratify the convention, the right of reply is not unknown there either. According to a decision passed in 1968 by the American Supreme Court, the statutory regulation providing for the right of reply in a specific scope is not considered to violate the freedom of expression and the freedom of the press (Case Red Lion Broadcasting Co. v. F.C.C. 395 US 367, 23 L Ed 2d 371, 89 S Ct 1794, pp. 380-382). A few years later, in 1973, the Supreme Court did not repeat the above statement, but in the case concerned this was probably due to the fact that the matter was related to the right of reply in an election campaign. As the reasoning of the decision argued, a revolution of communication had taken place since the time of the first amendment to the Constitution, the market of communication had changed, and at that time not everyone had the chance to present his views easily, the companies who owned the tools of media had become concentrated, and therefore a few people could decide on utilising various channels of

communication; however a person engaged in an election campaign had possibilities beyond the limits other people had (Case The Miami Herald Publishing Company v. Pat L. Tornillo, Jr. 418 US 241, 41 L Ed 2d 730, 94 S Ct 2831, pp. 735-741).

The Commission examined in a concrete case the possibility of applying the rule on the right of reply on the basis of the Convention of Rome. The Commission stated in relation to a petition filed with reference to the alleged violation of Article 10 of the Convention by the obligation to publish a reply that, although the right of reply provided for in organic Act 2/1984 of Spain restricted the freedom of expression of the petitioner, the restriction was a necessary and proportionate measure applied in the interest of protecting the reputation of others. The Commission also held that the publication of the reply served the purpose of informing the public as comprehensively as possible, and it was a tool of securing several sources of information (Case Ediciones Tiempo S. A. v. Spain, Decision of 12 July 1989, no. 13010/87, DR 62. 247). There is an acknowledged view based partly on the decision of the Commission that states may be regarded on the basis of Article 10 of the Convention as being bound to adopt rules on the right of reply or rectification (Case P. van Dijk, G.J.H. van Hoof, Theory and Practice of the European Convention on Human Rights, Deventer, Boston, 1990, 412-413).

The decision of the Commission referred to above is in line with the Resolution of 2 July 1974 of the Committee of Ministers of the Council of Europe adopting a recommendation on the rules concerning the right of reply. The recommendation provides for offering protection against statements of facts and expressions of opinions violating one's reputation, honour or human dignity, and it states the necessity of the application of a proper legal tool to achieve this purpose. According to the minimum rules found in the annex to the document, the right of reply shall be granted to those about whom false facts were published in the newspapers, on the radio or television. The recommendation sets the causes that may be used to justify the refusal of publishing a reply. Such causes include asking for the publication of a reply beyond a reasonably short period of time, asking for the publication of a reply larger in size than would be necessary for the correction of the information, or when the reply goes beyond the debated facts, when publishing the reply would, by virtue of its contents, constitute a criminal offence or would harm the legally protected interests of third persons, or when the person asking for the publication of a reply cannot prove his lawful interest [Resolution (74) 26 on the Right of Reply – Position of the Individual in Relation to the Press (adopted by the Committee of Ministers on 2 July 1974 at the 233rd meeting of the Minister's Deputies)].

Point 27 of Resolution 1003 on the Ethics of Journalism, adopted by the Parliamentary Assembly of the Council of Europe on 1 July 1993, called upon the States Parties to implement the above mentioned resolution of the Committee of Ministers on the right of reply in order to guarantee unified regulations. The resolution made a distinction between communicating facts and expressing opinions (points 4 and 5). However, it pointed out that "legitimate investigative journalism is limited by the veracity and honesty of information and opinions and is incompatible with journalistic campaigns conducted on the basis of previously adopted positions and special interests" (point 21). In point 26, the news media was called upon to rectify speedily any news item or opinion conveyed by them which was false or erroneous, and the national legislation was urged to provide for "appropriate sanctions and, where applicable, compensation". (Bírósági Határozatok Emberi Jogi Füzetek (Court Reports Human Rights Booklets) 1997/1, pp. 87-90).

11. On the basis of the above, it can be established about the right of reply in the broad sense that the obligation to publish a reply to a statement violating one's reputation or human dignity is considered a restriction of the freedom of the press (primarily the freedom of editing) and indirectly of the freedom of expression that serves the purpose of protecting fundamental rights specified in the Constitution – and in particular, human dignity, which is of especially great weight among them. This tool is necessary even if sanctions of criminal law are applied against the offender of human dignity, reputation or honour, as such a rule, which does not belong to criminal law, could ensure the provision of information on the position of the injured party to those who gained knowledge of the original statement. The obligation to publish the reply is designed to protect the fundamental right in the form of supporting those who are otherwise in a weaker position than those who dispose over the mass media. In cases where the statement did not violate any fundamental right, the purpose of the reply is to provide information to the public on the true facts and the affected person's own opinion; therefore, the obligation to publish the reply is justified by the need to inform the general public on the broadest possible basis and to use diverse sources of information. The requirement specified by the Council of Europe also supports the right of reply (obligation to publish the reply).

In line with the above arguments, on the grounds of Article 8 para. (2), Article 54 para. (1), Article 59 para (1), and Article 61 paras (1) and (2) of the Constitution as well as on the basis of the practice of the Constitutional Court, the right of reply in the broad sense is not deemed in general to unconstitutionally restrict the freedom of expression and the freedom of the press. However, it is only on the basis of the concrete provision on the right of reply (obligation to publish the reply) that a decision can be made on whether, within the given regulatory framework and in the case of the specified manner of exercising this right, the desired result is in proportion with the injury caused.

12. After clarifying that the right of reply is not unconstitutional in general, it has to be examined if the provision of the CCAm deemed objectionable by the petitioner qualifies as a restriction of the freedom of expression and the freedom of the press in the case of which the desired result is in proportion with the injury caused to the fundamental right.

The rule in question of the CCAm amends Section 79 of the CC. Section 79 is contained in the chapter on inherent rights and intellectual property rights. This chapter contained only a few rules at the time of adopting the CC in 1959. The legislation after the Second World War as well as the judicial practice paid little attention to protecting inherent rights such as human dignity and reputation. Although in 1959 the CC, on basis of a bill proposed in 1928 that followed the model of the Swiss Civil Code, declared the general rule of protecting inherent rights, it only contained a few detailed rules in addition to the general one. When the CC was amended in 1977, some new rules were introduced in the chapter on inherent rights – partly compensating for the steps that could not be made at that time in the field of public law. This was when the rectification rules were introduced into Section 79 and the earlier provision of procedural law was transposed into substantive law, with regulation in procedural law remaining in place.

The above were related to reply in the broad sense. However, Section 79 of the CC provides for the right of rectification, which is a narrower concept than reply in the broad sense. Rectification is only applicable to statements of facts and not to opinions. In addition, if a rectification is published, the wording is not specified by the person entitled to request the

rectification, although the legal entity voluntarily implementing the rectification or the court ordering such rectification may accept the wording offered by the injured party.

The right of reply as specified in Section 1 of the CCAm amending Section 79 para. (2) of the CC does not replace the right of rectification, but it provides for more rules in addition to the existing ones. One of the characteristics of this regulation is that it maintains the concept of rectification of a statement of facts, with contents to be finally defined by the court. A further feature is that the rule contained in the CCAm grants the right of reply against the statement of an opinion, but not automatically, as it may only be applied in the case of a violation of rights, the establishment of which takes a court decision in most cases. Another special feature of the rules specified in the CCAm is that the right of reply is not restricted and in general not even a court could set the limits of exercising one's right (e.g. the reply itself may be of an offensive nature, it may be of a much bigger size than the original statement, its contents may extend beyond those of the original statement, and in the case of more than one affected persons, each of them may reply on his own and without restriction). Furthermore, it must be taken into account when examining the proportionality of the restriction of the fundamental rights by the regulation under examination that the new provision in Section 84 para. (2) of the CC introduced by Section 2 of the CCAm provides for the obligatory imposition as an additional sanction of a fine usable for public purposes. The obligation of publishing the reply, complementing the obligation of rectification, and the definition of the right of reply without specifying the restrictions on its exercise results in a significant injury to the freedom of the press (freedom of editing). In addition, the possibility of legal consequences which are difficult to foresee results in the press refraining from publishing opinions.

Consequently, the regulation introduced by Section 1 of the CCAm does not establish a balance between the result achievable by the rules on reply designed to protect the fundamental rights of human dignity and reputation, on the one hand, and the disadvantage caused by restricting the fundamental rights to the freedom of expression and the freedom of the press, on the other. The rule specified in Section 1 of the CCAm introduces the right of reply among the existing tools of legal protection without setting the limits of exercising this right, and at the same time, it provides for imposing an obligatory fine, whereby it restricts the freedom of the press and – indirectly – the freedom of expression to an extent not justified by the protection of human dignity and reputation. Consequently, the Constitutional Court holds that the manner of regulating the right of reply in the new paragraph (2) – introduced by Section 1 of the CCAm – of Section 79 of the CC is unconstitutional.

The new part on the provision of the reply of Section 79 para. (3) of the CC – introduced by Section 1 of the CCAm – is merely the consequence of the rule provided for in paragraph (2), as it regulates a procedural question depending on the provisions of paragraph (2). As the above amendment contains no independent provision and as such it has no constitutional relation to Article 61 para. (2) of the Constitution, the Constitutional Court has not made a decision concerning it.

III

1. The petition requested the constitutional review of the last sentence of Section 84 para. (2) of the CC as specified in Section 2 of the CCAm. Section 2 of the CCAm supplements the rule in Section 84 para. (2) of the CC on imposing a fine usable for public purposes. The second sentence inserted provides for a fine to be imposed – without judicial

discretion – in all cases of the specified violation of rights. The last sentence of the amended paragraph (2) does not fix the maximum amount of the fine usable for public purposes, and it provides for setting the actual amount of the fine in each case on the basis of the expected preventive effect. Regarding the fine as having the features of fines imposed in the case of administrative infractions, the petition objects to the maximum amount of the fine not having been specified, and it claims that the new rule is incompatible with the requirement of legal certainty as an element of the principle of the rule of law, as well as that the new rule is incompatible with the freedom of expression and the freedom of the press due to its deterrent effect.

The Constitutional Court performs the preliminary examination of the unconstitutionality of the challenged provisions on the basis of a petition, in line with Section 35 para. (1) of the ACC. The petition raised concerns about the last sentence of Section 84 para. (2), but it did not cover the second sentence specified in Section 2 of the CCAm, nor did it initiate a posterior review of the constitutionality of the rule on the fine contained – independently from the CCAm – in Section 84 para. (2) of the CC. Accordingly, the Constitutional Court has only dealt with the last sentence of Section 84 para. (2).

2. An interpretation of the principle of the rule of law is found – among others – in Decision 11/1992 (III. 5.) AB of the Constitutional Court. It was established upon the comparative analysis of the laws of various countries that the principles of *nullum crimen sine lege* and *nulla poena sine lege* are constitutional obligations binding the State. The original meaning of the above principles is as follows: the conditions of the exercise of the State's punitive power must be determined in advance by law. Today this requirement means that criminal liability, sentencing and punishment must all be based on an Act of Parliament (ABH 1992, 77, 86).

In the practice of the Constitutional Court, the principle of the rule of law has primarily been examined in relation to certain concrete provisions of the Constitution. In the present case, the examination is performed in relation to the provisions on the freedom of expression and the freedom of the press. Legal certainty has, since the very beginning, been considered in the decisions of the Constitutional Court an important element of the rule of law. The predictability and the foreseeability of the whole of the law and of the specific statutes for the addressees of the norm are deemed a significant component of the meaning of legal certainty. Legal certainty requires not only an unambiguous wording of the statutory norm, but the predictability of the realisation of legal institutions as well. However, predictability and foreseeability do not exclude the possibility of the legislature and the authorities applying the law having discretionary powers [Decision 9/1992 (I. 30.) AB, ABH 1992, 59, 65]. It has also been pointed out by the Constitutional Court that abstract and too general statutory definitions may harm legal certainty, as such wordings may result in subjective decisions on the part of the authorities applying the law, in the development of differing practices by the various authorities applying the law, and in the lack of unity of law (Decision 1160/B/1992 AB, ABH 1993, 607, 608).

The Constitutional Court has taken into account of the Court's practice in this respect as well, and shall continue to do so. The principle and the practice of the Constitutional Court developed in relation to legal certainty are identical with the Court's requirements applied consistently in assessing the potential statutory restrictions of the rights specified in Articles 8-11 of the Convention. Accordingly, the restriction must be specified clearly enough to make it possible for citizens to adapt their behaviour to the norm, and the consequences of an act

must be foreseeable. It is, however, possible that foreseeability can only be achieved with the support of an appropriate legal advisor. It was also pointed out by the Court that the law must adapt to the changing circumstances, and therefore no absolute predictability can be ensured, and general rules with vague content are often needed the interpretation of which has to be done on a casual basis (Case Sunday Times v. The United Kingdom, Decision of 26 April 1979, Series A, no. 30, p. 31, para. 49).

The Court examined the foreseeability of the weight of legal consequences in the Tolstoy Miloslavsky case. It repeated the position that had been stated earlier in another decision, namely that the requirement of foreseeability is deemed to be met even in the case of a statute vesting discretionary powers on the judge, provided that the scope of discretion is indicated with sufficient clarity to give the individual adequate protection against arbitrary action. The absence of advance predictability is particularly true of damages, the amount of which, due to the nature of the field of law concerned, is always fixed subsequently. Consequently, the Court did not declare the incompatibility of the rule with the Convention, but it established that the amount of damages awarded (1.5 million pounds), which was exceptionally high as far as the English judicial practice was concerned, had not been proportional to the legitimate objective the assessment of damages was based upon (Tolstoy Miloslavsky v. The United Kingdom, Decision of 13 July 1995, Series A no. 316-B, paras 41, 42, and 55, Bírósági Határozatok melléklete (Annex to the Court Reports) 1996/2, pp. 44-46).

On the basis of the above, requiring statutes, on the grounds of the principle of the rule of law, to specify foreseeable legal consequences does not preclude the possibility of discretionary assessment by the authorities applying the law, however, the criteria of application must be determined to a sufficient extent, and foreseeability depends on the inherent features of the legal consequence concerned as well.

The above are to be taken into account when assessing the rule providing for the criteria of imposing a fine usable for public purposes without specifying the upper limit of the amount of such fine.

3. Pursuant to Section 1 of Act I of 1968 on Administrative Infractions, and to Section 1 para. (1) of Act LXIX of 1999, administrative infractions may be determined in an Act of Parliament classifying certain unlawful acts as administrative infractions. Classifying an act as an administrative infraction has consequences both in terms of procedural law and enforcement.

The concept of fine usable for public purposes was introduced into the text of the CC in 1977. It had been preceded by Section 53 para. (2) of Act III of 1969 on Copyright that provided, in the case of unlawful use of a copyright work, for the payment of a fine equalling the author's fee in addition to the payment of the fee payable to the author and the imposed damages if the violation of rights was attributable to the user. At the time of amending the CC in 1977 – as a sign of closer connections with the regulations on intellectual property rights – the rule on fine in the Copyright Act was transposed into the CC, and the scope of the rule was extended to include the violation of inherent rights as well as the violation of all intellectual property rights. Neither the Copyright Act of 1969, nor Act IV of 1977 amending the CC, nor the CCAm declared any acts to be administrative infractions. The court orders the payment of the fine usable for public purposes in the course of the civil procedure, together with making a decision on damages, taking into account the amount of damages. Payment of damages imposed but not paid is to be enforced in accordance with the rules on civil law

claims awarded. Although the fine is not identical with the damages, the unusual legal consequence applied in the regulation of civil law relations does not result in the violation of inherent rights being classified as an administrative infraction, just like finding in favour of the State under Section 237 para. (4) of the CC, in the case of which, too, an amount of money is to be paid, does not lead to types of conduct resulting in the invalidity of a contract being classified as administrative infractions.

4. The introduction into Hungarian law of the fine usable for public purposes is related to the fact that in the case of the violation of inherent rights either no material damage can be identified or the identified damage is of a low amount, while the inconvenience or injury caused is often great. In such cases non-material damages may be awarded. In 1953, however, Resolution No. III of the Supreme Court on Civil Law Principles abolished non-material damages, and in 1959, the CC did not provide for awarding such compensation to the injured party. Non-material damages were re-introduced with a limited scope in the 1977 amendment of the CC, nevertheless, in the judicial practice this institution unknown since 1953 was applied in a restricted manner. The lack of non-material damages was the theoretical ground of introducing – as a substitute – the fine usable for public purposes in the Copyright Act of 1969 (the denial of non-material damages at that time resulted in not paying the amount to the injured party). Due to the persisting antipathy and doubtfulness concerning non-material damages, the institution of the fine remained in force even after 1977. The inadequacy of the rules and practices concerning non-material damages also explain Section 19 para. (4) of Act II of 1986 on the Press as introduced by an amendment in the year of 1990, which specifies that in a lawsuit for rectification in the press or in another civil lawsuit against the press, the court may impose on the organs specified in the Act a fine usable for public purposes. In a decision passed by the Supreme Court in a concrete case at the time of the provision being in force, it was pointed out that the fine represented the disapprobation of society and it served as a general measure in order to prevent the commission of similar acts in the future (Bírósági Határozatok (Court Reports) 1991/9, 353).

As early as in 1992, the Constitutional Court demanded the changing of the practice concerning non-material damages [Decision 34/1992 (VI. 1.) AB, ABH 1992, 192, 201-202]. It was elaborated in the decision about the freedom of expression that the reaction to abusive statements should not be one of criminal law measures, but one of criticism, however, a high amount of damages payable should also be part of the procedure [Decision 30/1992 (V. 26.) AB, ABH 1992, 167, 180].

5. The most important legal systems apply non-material damages in the case of the violation of inherent rights, and, in particular, of reputation. In assessing the amount of non-material damages to be paid, the compensation of the injured party has an important role to play, together with the purpose of preventing similar acts of violation in the future.

Article 49 para. (1) of the Swiss Code of Obligations specified in the amendment of 16 December 1983 provides that if one's inherent rights are violated, compensation of an appropriate amount shall be payable if and when the gravity of the act of violation so justifies and there is no other way of providing remedy. In the French judicial practice, non-material damages are awarded in addition to material ones when the conduct of the party causing the damage justifies "private punishment". According to Section 253 of the German BGB, non-material damages may only be awarded if they are expressly provided for by the law. Accordingly, Section 847 provides for some cases in which recompense – of a non-material damages nature – is to be paid. According to the practice of the German Supreme Court

developed after the Second World War, recompense may also be awarded in cases not listed in the Code if inherent rights are violated. The German Constitutional Court held that recompense applied in the interest of protecting personality rights was constitutional (BGH, Neue Juristische Wochenschrift 1965, p. 685; BVerfGE 34, p. 269). According to the practice of the German Supreme Court, the fine is to be applied with due regard to the gravity of the liability of the party causing the damage and to the level of interference. By serving the purpose of compensation, this institution is close to private punishment. In English law, the violation of reputation is sanctioned by the payment of damages, and in this case, the definition of the amount is based – although in an implied manner – on the objective of deterring people from committing similar acts of violation. There are two types of damages payable: one of them serves the purpose of compensating for the damage done, while the other one is of a punitive nature (B. S. Markesinis, S. F. Deakin, Tort Law, Oxford, 1996. 3 ed. pp. 600-601). In the judicial practice of the USA, it is usual to award high amounts of damages. American law also uses the category of punitive damages in certain cases, for example in that of harming one's reputation. A decision passed in 1986 clarified several fundamental questions about the liability related to punitive damages (Case Philadelphia Newspapers, Inc. v. Maurice S. Hepps et al., 475 US 767, 89 L Ed 2d 783, 106 S Ct 1558, 790-793).

6. In Hungarian law, the amount of damages payable is not defined in advance by an Act in respect of either material or non-material damages. Even the conditions of liability for damages are only specified in a general manner. The unforeseeable and indefinite nature of the sanction applied is related to the inherent features of the legal consequence, the violation of the principle of the rule of law cannot be established on this ground. The fine usable for public purposes as provided for in the text in force of Section 84 para. (2) of the CC is in line with the above features, as it may be awarded by the court if the amount that can be awarded as damages is disproportionate to the gravity of the actionable conduct. This is the rule supplemented by Section 2 of the CCAm with the provision on the fine to be obligatorily imposed by the court.

Decision 1270/B/1997 AB has already dealt with Section 15 para. (3) of Act LVIII of 1997 on Business Advertisements empowering the courts to impose a fine the amount of which is not defined in the Act. However, the issue of legal certainty was not raised in the above decision, and the Constitutional Court rejected the petition challenging the provision concerned on the basis of examining other questions (ABH 2000, 713).

Consequently, the new last sentence in Section 84 para. (2) of the CC introduced by Section 2 of the CCAm may not be regarded as violating the principle of the rule of law on the ground of the fact that the maximum amount of the fine usable for public purposes, adjusted to the regulation on damages, is not determined even in the last sentence. Every sanction has, to a certain degree, the effect of preventing the commission of similar acts by way of the disadvantage caused. Therefore, the sanctions of civil law may not be deemed unconstitutional, and the same is true of the fine usable for public purposes, which cannot be regarded as a usual civil law sanction (but serving to a certain degree the function of civil law sanctions).

There is no constitutional relation between the freedom of expression or the freedom of the press and the provision in the last sentence of Section 84 para. (2) of the CC introduced by Section 2 of the CCAm, in which the deterrent effect on the injuring party is mentioned as the basis for imposing the actual amount of the fine. It is the fine itself that has a restrictive

effect concerning the freedom of expression and the freedom of the press. In this regard, it is not important whether imposing the fine is based on the gravity of the actionable conduct or on the expected deterrent effect.

Accordingly, the Constitutional Court has not established the unconstitutionality of the last sentence in Section 84 para. (2) of the CC.

7. Having regard to the importance of the position in principle included herein, the Constitutional Court publishes this Decision in the Hungarian Official Gazette.

Budapest, 4 December 2001

Dr. János Németh
President of the Constitutional Court

Dr. István Bagi
Judge of the Constitutional Court

Dr. Mihály Bihari
Judge of the Constitutional Court

Dr. Ottó Czúcz
Judge of the Constitutional Court

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Dr. Attila Harmathy
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Dr. András Holló
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Dr. István Kukorelli
Judge of the Constitutional Court

Dr. János Strausz
Judge of the Constitutional Court

Dr. Éva Tersztyánszky-Vasadi
Judge of the Constitutional Court

Concurring reasoning by Dr. Mihály Bihari, Judge of the Constitutional Court

I agree with the Decision adopted by majority. I also agree with the statement made in point II/11 of the Reasoning in the majority decision that "(…) the right of reply in the broad sense is not deemed to unconstitutionally restrict (…) the freedom of the press. However, it is only on the basis of the concrete provision on the right of reply (obligation to publish the reply) that a decision can be made on whether, within the given regulatory framework and in the case of the specified manner of exercising this right, the desired result is in proportion with the injury caused." Nevertheless, I hold it necessary to supplement the Reasoning of the majority Decision with the following.

1. The statutorily guaranteed right of reply and the statutory obligation to publish the reply serve the purpose of guaranteeing the plurality of opinions published in the press, preventing the formation of monopolies of opinions, securing the plurality of opinions in the course of public debates where the parties have no equal means, and through all the above, the enforcement of the freedom of the press. However, it is not the right of reply that primarily ensures the freedom of the press and the plurality of opinions. The right of reply is only the

final means to guarantee the plurality of opinions published in the press and the expansion of public debates in the press.

The right of reply and the obligation to publish the reply are inseparable. While the right of reply serves the purpose of guaranteeing the plurality of opinions and the freedom of publishing opinions in the special tool called the press, the obligation to publish a reply is a restriction of the freedom of the press, and in particular, of one of its components, the freedom of editing. However, the obligation to publish a reply in itself does not – in my opinion – restrict the freedom of expression, because journalists do have the possibility to comment on the reply and to publish, on a continuous basis, new replies to the replies published.

The freedom of the press is one of the most important institutions, guarantees and tools of democratic and constitutional political systems. The freedom of the press is a complex freedom consisting of several components. The most important components of the freedom of the press are the following: the freedom of establishing press products, the freedom of producing press products, the freedom of editing press products, and the freedom of opinions expressed by journalists and editors in the press.

The opinions and value judgements presented in a concrete press product are controlled by the columnists, editors, the editor-in-chief and finally by the owner, who take into account not only the aspects of publishing competing opinions in the press, but also those of preserving the specific image and spirit of the press product concerned, the marketability of the product and the requirement of profitable operation. This is what is restricted by the obligation of publishing a reply, on the basis of which the publication of subsequent replies can become a never-ending process. Thus the obligation of publishing replies may cause a press product to lose its characteristic image or political orientation. This may also lead to losing the customers who buy and finance the press product. Nevertheless, the institution of reply may not be instrumental in creating a forced plurality of opinions within a concrete press product that would result in the disproportionate restriction of the freedom of editing in the form of an obligation to regularly publish in the press product concerned opinions that contradict the opinion of the editor and the editorial staff, as a result of the obligation of publishing replies.

As the establishment of the right of reply and guaranteeing the plurality of opinions presented in the press may result in a significant restriction of the freedom of editing the press, it is particularly important that the extent of the restriction applied should not be so great as to result in the loss of the specific profile or image of the press product concerned, or in an obligation to publish on a continuous basis a great volume of opinions that are contrary to the editors' opinion. Therefore, the restriction of the freedom of editing the press for the purpose of securing the plurality of opinions must comply with the requirement – deduced by the Constitutional Court at the beginning of its activities from Article 8 of the Constitution and applied consistently ever since – that "the importance of the objective to be achieved must be proportionate to the restriction of the fundamental right concerned" [Decision 30/1992 (V. 26.) AB, ABH 1992, 167, 171] Consequently, together with the introduction of the right of reply, its limits should have been determined as well, for the purpose of protecting the freedom of editing the press.

Undoubtedly, an extremely imbalanced situation can come about between the opinions of those who dispose over the publicity of the press and the opinions of persons, affected by the above opinions, who have no available means of press publicity. Still, the right of reply may not be absolute and unlimited. The unlimited exercise of the right of reply specified in the Act

amending the Civil Code means a disproportionate restriction affecting the freedom of editing the press, and it may even restrict the essential contents thereof. Restricting the right of editing the press through the obligation of publishing replies must be proportionate to the purpose – securing the plurality of opinions – that the institution of reply was established for. Similarly to the restriction of the freedom of expressing one's opinion, the limits on the right of reply must be determined together with the establishment of the institution of reply. Without such limitations, the right of reply violates Article 8 of the Constitution. Therefore, the institution of reply established by way of the amendment of the Civil Code restricts in an unconstitutional manner the freedom of editing the press, as it fails to define the limits on the right of reply for the purpose of protecting the freedom of editing.

2. The manner of regulating the right of reply is closely related to the institution of the fine usable for public purposes to be imposed on press products according to the new paragraph (2) in Section 84 of the Civil Code. The fine represents a sanction related to and exceeding the obligation of publishing the reply. Therefore, in the constitutional review of the institution of reply, the institution of the fine has to be taken into consideration, too. In my opinion, the obligation of publishing the reply sanctioned with a fine to be used for public purposes restricts the freedom of the press to a disproportionate degree. The following support the statement on disproportion:

The second sentence in the new paragraph (2) of Section 84 of the Civil Code provides that, in the case of establishing a violation committed by the press, the courts are obliged to order the payment of a fine usable for public purposes. Thus the court has no discretion concerning whether to impose the fine or not. In the case of establishing violation, the fine shall be imposed in all cases together with ordering the publication of the reply.

In the case of the violation of inherent rights by the publication of an opinion or value judgement the fine usable for public purposes must be imposed obligatorily only on the press product concerned. In the case of a similar violation, the respondent would not be the subject of any sanction (with the exception of defamation and libel defined in the Criminal Code). This way, when imposing the fine usable for public purposes, the requirement of deterring from the future violation of inherent rights is met solely in the case of the press. A one-sided prohibition and sanctioning of publishing offensive opinions is an excessive and disproportionate restriction of the plurality of opinions in the press, and thus it qualifies as a violation of the freedom of the press.

Thus, I do not consider in general the introduction of the institution of reply to be unconstitutional. However, the new provision introduced as an amendment to the Civil Code does not comply with the requirement set in Article 8 of the Constitution, as the violation of fundamental rights caused by the obligation of publishing replies for the purpose of securing the plurality of opinions is disproportionate, and it can also result in restricting the essential contents of the freedom of the press. Consequently, the concrete provision on the right of reply is unconstitutional.

Budapest, 4 December 2001

Dr. Mihály Bihari
Judge of the Constitutional Court

Dissenting opinion by Dr. Ottó Czúcz, Judge of the Constitutional Court

I do not agree with the statement made in the majority Decision establishing the constitutionality of the method of defining the amount of the fine to be used for public purposes as specified in the last sentence of Section 84 para. (2) of the CC to be introduced by Section 2 of the CCAm. In my opinion, this method should have been declared unconstitutional, and the holdings of the Decision should have contained a statement to that effect.

I cannot accept the summary conclusion made in the Reasoning, stating that the fine usable for public purposes is a legal institution adjusted to the regulations on damages, and therefore, if the civil law sanctions are not considered unconstitutional, "the same is true of the fine usable for public purposes, which cannot be regarded as a usual civil law sanction (but serving to a certain degree the function of civil law sanctions)." (third paragraph of point III/6 of the Reasoning.) In my opinion, there are significant differences between the two legal institutions in terms of functions and legal character, which do not make it possible for us to consider these institutions interchangeable to such an extent.

As early as in 1992, the Constitutional Court examined the issues of constitutionality related to non-material damages. At that time, it established the following: non-material damages serve the purpose of "securing an estimated counterweight to the injury done, by providing a material service that offers an advantage of another kind and of an approximately equal level." [Decision 34/1992 (VI. 1.) AB, ABH 1992, 192, 195] Consequently, according to the interpretation of the Constitutional Court, this institution has the basic function of offering a remedy for the harm suffered by the injured party.

However, the obligatory fine to be introduced by the CCAm has a completely different purpose. About the amount of the fine to be imposed, the planned amendment states the following: "…its amount shall be fixed at a level suitable for preventing the perpetrator from committing further acts of violation." Thus the objective here is not that one of the parties should remedy the harms suffered by the other party, but that the State should apply its means of exercising public authority for the purpose of making the party who caused the injury change his behaviour. The legal institutions of such repressive purpose typically fall into the regulatory realm of other fields of law (e.g. criminal law, procedures of administrative infractions). As the rules of civil law are designed to regulate non-hierarchical relations between parties, the proliferation of the application (since the adoption of the Copyright Act in 1969) of such sanctions reflecting considerations of public authority may result in mixing the State's various functions as well as in the misinterpretation of the State's roles, and thus – in my opinion – such trends themselves may be considered problematic with respect to the requirement of the predictability of the State's behaviour (towards its citizens) and the criteria of legal certainty.

However, concerns may be raised against this method in particular if a framework is not defined for the application by the courts of the repressive sanctions mentioned, in respect of the limits of imposing the fine concerned. Without such limitations, the judicial discretion (or potential judicial arbitrariness) could be too broad, which may endanger the foreseeability of the effects of the given statute on the person concerned and the predictability of the consequences for the addressee of the norm. This is not compatible with the requirement of legal certainty deducible from the principle of the rule of law specified in Article 2 para. (1) of the Constitution.

The problem becomes even more complex if the fine usable for public purposes is applied in order to influence or form behaviour closely related to the freedom of the press related to the freedom of expression, which is protected by the Constitution and plays a special role among the fundamental rights according to an earlier decision of the Constitutional Court [Decision 30/1992 (VI. 26.) AB, ABH 167, 170]. In the situations of life related to such protected fundamental rights, it is especially important that the addressee of a legal norm prescribing unfavourable legal consequences for certain types of conduct should have knowledge of the potential sanctions that may result from his conduct.

In the case to the contrary, as argued in the motion submitted by the President of the Republic initiating the prior examination, “the person affected is not in a position to adequately assess the consequences of his conduct.” This, “due to the unpredictability, threatens those who enjoy the fundamental rights in question to such an extent that they may be deterred from the guaranteed and protected exercise of these rights.” This constitutes a violation of both Article 61 paras (1) and (2) of the Constitution and the principle of the rule of law specified in Article 2 para. (1) of the Constitution.

Consequently, in addition to establishing the unconstitutionality of the right of reply in the form defined in the CCAm (a statement I do agree with), in my opinion, the Constitutional Court should have established and stated in the holdings that an unlimited possibility of imposing the fine violates the requirement of legal certainty as well as Article 61 paras (1) and (2) of the Constitution.

Budapest, 4 December 2001

Dr. Ottó Czúcz
Judge of the Constitutional Court

Dissenting opinion by Dr. András Holló, Judge of the Constitutional Court

I do not agree with the restrictive position given in the Decision that only “the manner of regulating the right of reply as determined in the new paragraph (2) introduced by Section 1 of the Act of Parliament adopted at the session of the Parliament on 29 May 2001 to Section 79 of Act IV of 1959 on the Civil Code” is unconstitutional; furthermore, I do not agree with rejecting the petition in respect of the last sentence inserted in Section 84 para. (2).

In line with the practice of the Constitutional Court, it should have been established that the right of reply restricts the freedom of expression, and in particular the freedom of the press as an institutionalised form of key importance thereof not only disproportionately, as far as the regulatory contents examined are concerned, but, as a new legal institution, beyond the necessary limits, too.

1. In the decisions of the Constitutional Court interpreting the freedom of expression and the freedom of the press, the paramount constitutional value of these fundamental rights was pointed out, and thus the Constitutional Court defined – for itself – a task of constitutional protection of special importance.
The Constitutional Court justified its position in detail with the prominent role played by such rights in the life of a democratic society and in social processes. [Decision 30/1992 (V. 26.) AB, ABH 1992, 167, hereinafter: Dec.I; Decision 36/1994 (VI. 26.) AB, ABH 1997, 219, hereinafter: Dec.II]

Although the above basic decisions interpreting the freedom of expression and the freedom of the press were elaborated as a result of the constitutional review of certain provisions of the Criminal Code, the statements of principle and constitutional standards are to be followed in general in assessing the constitutionality of restricting fundamental rights. Namely:

– the laws statutorily restricting the freedom of expression shall be interpreted strictly, and "there are only a few rights which have priority over" the freedom of expression (Dec.I, 1992, 178);
– "The right to the freedom of expression protects opinion irrespective of the value or veracity of its content. (Dec.I, 1992, 179)

The above criteria of assessment are to be taken into account when examining whether the "extra restrictions" – a term used in the Decision – restrict the essential content of the freedom of expression, and, in particular, that of the freedom of the press.

The enforcement of the prohibition of restriction provided for in Article 8 para. (2) of the Constitution, and the constitutional protection of the essential content of the fundamental right means in the practice of the Constitutional Court the application of the so-called fundamental rights test elaborated in the first year of its operation: the examination of the necessity and proportionality of the restriction. (Decision 20/1990 (X. 4.) AB, ABH 1990, 69; Dec.I; Dec.II) Accordingly, a fundamental right may only be restricted constitutionally in a statute if this is the only way of protecting another fundamental right, constitutional value or constitutional objective; a restriction which complies with the above requirements – thus one that is necessary – also has to meet the requirement of proportionality: the legislature must use the least restrictive measure to reach the objective, and the desired goal must be in proportion with the injury caused to the fundamental right.
Therefore, the Constitutional Court applies case by case the fundamental rights test as the criteria of assessment when examining the contents of the restriction, and it is on the basis of such assessment that it elaborates an opinion on whether or not the level of restriction affecting the content of the fundamental right is constitutionally acceptable. Other substantial aspects of the standard are, on the basis of Dec.I, the following: the constitutional values endangered by the freedom of expression, and primarily any direct threat to the fundamental rights, as well as feedback on endangerment and evidence of real danger.

Thus, in the present case, the primary question of the constitutional review is whether the right of reply may be considered an unavoidable, and by other means not feasible and necessary restriction of the freedom of the press in the interest of protecting another fundamental right: the right to human dignity as a general personality right, including such elements as honour and reputation.
The insertion of the statutory provisions in question into the CC by the legislature is intended to serve the following purposes: offering remedy for the violation of inherent rights and the prevention of future acts of violation. The same legislative objective motivated the establishment of all existing institutions in the field of civil and criminal law constituting the external limits on the freedom of the press.
The legal institutions established for the protection of fair and true information serve the purpose of safeguarding the right to human dignity and its elements, honour and reputation: the statutory definitions in the Criminal Code, the procedure of rectification in the press, non-material damages and the fine usable for public purposes.

In my opinion, in the case of restricting a fundamental right on more than one level, the constitutional examination of the statutory definition of further restriction and the application of the necessity and proportionality standard should not be performed solely in respect of the new statutory restriction, but on the basis of the complex evaluation of the interrelations between existing and new restrictions. This method of examination is even more justified in the case of the freedom of expression and the freedom of the press, due to the values (of paramount importance in a democratic society) protected by them. Therefore, in the present case, the new statutory restrictions – the right of reply and the new statutory provisions on the fine usable for public purposes (obligatory fine without an upper limit on the amount) – are to be examined in the light of the existing statutory restrictions and legal procedures in force.

The Constitutional Court has pointed out that the Constitution guarantees free communication, interpreted as both "individual behaviour" and a "social process". The right of the freedom of expression is not related to the contents of the opinion: "Every opinion, good and damaging, pleasant and offensive, has a place in this social process, especially because the classification of opinions is also the product of this process. Everyone – including the State – may support opinions he finds agreeable or act against ones he deems incorrect, provided that in doing so he does not violate some other right to such an extent that the freedom of expression is forced to retreat." (Dec.II, 1994, 219, 223)
The legislature is obliged to assess the potential tools of restricting the fundamental rights, and to select the "least restricting" tool suitable to reach the desired objective with the least damage caused to the fundamental right. (Dec.I, 1992, 171)
The regulation on the right of reply restricts the freedom of the press without due regard to the difference between stating facts and presenting value judgements. As far as facts are concerned, a false statement may be counterweighted by rectification, and thus the injury to human dignity, honour and reputation can be remedied, too. Stating false facts or distorting true statements constitute a real threat to fundamental rights. The rectification procedure, as a tool of protecting a fundamental right, and as the external limit on the freedom of the press, essentially covers and repairs the injured fundamental right to be protected. What remains beyond that, i. e. the injury to fundamental rights caused by subjective value judgements and opinions (an aspect of protection related primarily to the prestige of the public role played by the group of supposedly and typically affected persons, and as such, to be assessed beyond the realm of dignity…) does not, in my opinion, render indispensable the application of further restrictions to secure the right of reply. The honour and reputation of a person presented in (or affected by) the media is protected against false statements by the procedure of rectification. This procedure can counterbalance the negative judgement of the affected person by society, and offers a remedy for the damage done to the person's dignity. Non-material damages that may be awarded concurrently have the function of enhancing moral values. Rectification – of an adequate content – re-evaluates in the eyes of the public the opinion or value judgement published in the press, and the author of the opinion is thus reprimanded. Therefore, the presumption that there is a real danger of further injury to the fundamental right left unremedied can hardly be supported by evidence. [Let me note in brackets that in the case of the vast majority of the international practice referred to in the Decision the right of reply is granted only in the case of stating (alleged) facts.]
Interpreting the concept of rectification in a broader or narrower sense is a question of judicial practice. Ensuring the possibility of joint response instead of handling separately an opinion closely related to the statement of facts may be considered a request for rectification.
From another point of view, the value judgement itself necessarily involves subjective reactions in the recipients of the communication. Thus, the recipient himself decides and evaluates: he either identifies with the opinion or rejects it. Therefore, the petition is right in

stating that, presumably, “a value judgement beyond the limits of accepted social discourse shall not be accepted by the general public”.

The constitutional guarantee of the freedom of the press is the “non-interference of the State in respect of content”. (Decision 37/1992 (VI. 10.) AB, ABH 1992, 227, 229) In addition to the so-called safeguard approach, the freedom of the press has got subjective legal aspects, too: the development of the image, attitude and ideological profile of the press product as well as the freedom of editing. The freedom of editing is an element of fundamental right value of the freedom of the press. The obligation to publish a certain opinion or value judgement would interfere with the most subjective realm of the press, the formulation of opinion, and the work of evaluating factual data. The right of reply (is therefore an additional restriction which) does restrict to an unnecessary extent the freedom of editing, and thus the essential contents of the freedom of the press. There is no serious, real and direct danger threatening the fundamental right and no related objective of remedying which would constitutionally justify any institutionalised restriction beyond – and in addition to – rectification and the occasional awarding of non-material damages.

The constitutionality of the right of reply as a preventive tool of protecting fundamental rights – if the legal tool in force (external limit) is the fine usable for public purposes, a sanction-like institution – cannot be established either, as it does not comply with a constitutional standard specified by the Constitutional Court concerning the restriction of fundamental rights: the application of the least restrictive tool. The damages and the fine together have the necessary preventive effect, and they restrict the freedom of the press to a lesser extent than the right of reply.

2. I do not agree with rejecting the petition aimed at the establishment of the unconstitutionality of the last sentence in Section 84 para. (2) of the CC as introduced by Section 2 of the Act of Parliament detailed (examined) under point 1, that is, with the statement that “…there is no constitutional relation between the freedom of expression or the freedom of the press and…” the provision in question “…in which the deterrent effect on the injuring party is mentioned as the basis for imposing the actual amount of the fine…”
The examined Act added the following two sentences to Section 84 para. (2) of the CC: “If the violation of rights was performed through a daily paper, magazine (periodical), the radio or the television, the court shall also order the perpetrator to pay a fine usable for public purposes. The amount of the fine usable for public purposes shall be fixed at a level suitable for preventing the perpetrator from committing further acts of violation.”
The fine usable for public purposes is an institution with a character different to non-material damages; it is a special sanction of a repressive-preventive nature. The amount of the damages awarded under civil law is undoubtedly the result of the judicial assessment of the damage suffered. However, in the case of the fine usable for public purposes, a sanction expressing disapproval of given behaviour of the press by society, defining its “upper limit” by reference to an abstract legislative aim, the principle of prevention, instead of setting a fixed amount does not comply with the requirement of legal certainty regarded – in the practice of the Constitutional Court – as an “indispensable element” of the rule of law (Decision 9/1992 (I. 30.) AB, ABH 1992, 59, 65). At the same time – as pointed out by the petitioner – its “unpredictability” has a significant impact on the essential contents of the freedom of the press, the freedom of editing, thus violating Article 61 para. (1) of the Constitution.

3. The Decision applies a strict interpretation of Section 35 of Act XXXII of 1989 on the Constitutional Court (hereinafter: the ACC), therefore it only considered the new last sentence in Section 84 para. (2) of the CC to be the subject of the petition.
According to Section 35 para. (1) of the ACC, "Upon the petition of the President of the Republic, the Constitutional Court examines the provisions thought to be of concern in statutes adopted by Parliament prior to promulgation."
In my opinion, the statutory term "provisions of concern" should have been interpreted by the Constitutional Court in a broad sense – on the basis of the Constitutional Court's function of protecting the Constitution in general, with due regard to the close connections within the given norm to be examined, to the special preventive nature of this competence, and to the obligation of co-operation between the constitutional organs –, and the penultimate new sentence in Section 84 para. (2) of the CC should have been involved in the scope of the constitutional review. Accordingly, if the provision of non-material damages was performed through a daily paper, magazine (periodical), the radio or the television, the court is obliged to order the perpetrator to pay a fine usable for public purposes. This means that in the case of all violations of rights, the awarding of damages proportionate with the negative behaviour of the press shall be supplemented with a fine imposed automatically. The Act excludes the possibility of the judicial assessment of proportionality. The two new provisions together could result in a threatening effect of such gravity that could deter people from exercising the freedom of the press. The existence of such external limitations would not serve the primary purpose of preventing presumed acts of violation; it would rather influence with high efficiency the case-by-case formation of the concept of editing by virtue of leading to forced considerations, which would unnecessarily and excessively restrict the freedom of editing.

In summary, the new external (additional) limitations on the freedom of the press, i.e. the legal institution of reply, the fine usable for public purposes to be imposed obligatorily and without a fixed maximum amount – with regard to the existing external limitations – restrict the freedom of the press (the freedom of editing) beyond the necessary extent, and thus they violate the constitutionally protected essential contents of the fundamental right.

Budapest, 4 December 2001

Dr. András Holló
Judge of the Constitutional Court

Dissenting opinion by Dr. László Kiss, Judge of the Constitutional Court

I

1. Although on other grounds, I agree with the statement made in the majority Decision about the unconstitutionality of the rule on the right of reply as determined in the new paragraph (2) introduced by Section 1 of the Act of Parliament adopted at the session of the Parliament on 29 May 2001 to Section 79 of Act IV of 1959 on the Civil Code (hereinafter: the CC).

2. However, I do not agree with the majority Decision in respect of not establishing the unconstitutionality of the new provision in Section 84 para. (2) of the CC.

II

Before setting out my arguments, let me refer to two general aspects:

1. I believe that in respect of the present petition, the stake is much more than the constitutionality of the provisions aimed at the amendment of the CC. I personally hold that the fundamental problems are rooted in the fact that up to the present day, the Parliament has failed to adopt an Act on the freedom of the press, placed by Article 61 para. (3) of the Constitution into the group of Acts subject to two-thirds majority. The lack of a "constitutional press law" based on a broad consensus offers an opportunity for the Parliament to adopt Acts requiring simple majority (here: the amendment of the CC) for the regulation of relations which should rather be the subject of an Act on the Press to be adopted with two-thirds majority as provided for in Article 61 para. (3) of the Constitution. In the present case, the framework of civil law is a strait-jacket, regulating, in theory and in practice, relations that fall outside its nature and scope. This is a case of preserving and sustaining a legal construction originating from times before the political regime was changed, still representing the attitude that the protection of individual persons and their personality can – at least in the scope under review – only be achieved by regulation in the CC.

With respect to the situation prevailing in the era concerned, introducing into the CC in 1977 the institution of rectification in the press – way before the adoption of Act II of 1986, together with other measures aimed at the protection of personality – was a progressive step. At that time, no one could think of the establishment of constitutional guarantees for the protection of persons, and it was civil law that undertook the protection of personality. However, the fact that a certain institution of law or a legal construction was progressive in 1977 does not entail that it remains progressive in another system of constitutional order. On the basis of the above, I am convinced that without the mediation of the "constitutional Act on the Press", the rules of the CC in force on rectification in the press would not pass the test of constitutionality either.
The petitioner refers to the "violation of the freedom of the press" in respect of the CCAm. This may occur not only in the form of the Republic of Hungary not protecting with due weight the freedom of the press on the basis of Article 61 para. (2) of the Constitution, unnecessarily restricting this freedom and causing a disproportionate injury, but also in the form of creating an Act which affects the freedom of the press (here: the freedom of editing), if the manner of creation is other than the one prescribed in the Constitution. Therefore, in my opinion, the examination of the "violation of the freedom of the press" should have covered Article 61 para. (3) of the Constitution as well.

2. In addition to examining the question of two-thirds majority, I hold that the importance of being bound to the petition can also be raised when assessing the constitutionality of the institution of the fine usable for public purposes.

The only request expressly put forward in the petition was that the Constitutional Court establish the unconstitutionality of the last sentence in Section 84 para. (2) of the CC as introduced by Section 2 of the CCAm. In the present case, too, it is a question whether the Constitutional Court may decide on issues not covered by the petitioner's request. In this respect, I maintain the same opinion I expressed in my concurring reasoning attached to Decision 2/2001 (I. 17.) AB. Namely, even in the case of a motion by the President of the Republic aimed at a preliminary constitutional review, the Constitutional Court may explore to a greater extent the statutory environment in

question. [N.B.: it was in respect of Section 14 para. (2) of Act II of 1986 on the Press that – upon a motion by the President of the Republic aimed at a preliminary constitutional review – the Constitutional Court established the unconstitutional omission of a legislative duty. Decision 48/1993 (VII. 2.) AB, ABH 1993, 314, 319] Thus the Constitutional Court may not interpret in a strict sense its competencies specified in the ACC, and the effective protection of constitutionality may necessitate the constitutional examination of other provisions (here: the condition of applying the legal consequence) closely related to the challenged provision.
Therefore, in my opinion, being bound to the petition should not be interpreted in the present case, either, as not allowing the examination of the Constitutional Court to extend beyond the review of the last sentence in Section 84 para. (2) of the CC introduced by Section 2 of the CCAm.

III

1. Although I do agree with the statement made in the majority Decision about the unconstitutionality of the planned rule on the right of reply, this does not mean that I share in every respect the views expressed in the Reasoning.

My first objection to the Reasoning is related to the conclusion in point II. 11 of the majority Decision. According to the majority Decision, having regard to Article 8 para. (2), Article 54 para. (1), Article 59 para (1), and Article 61 paras (1) and (2) of the Constitution as well as to the practice of the Constitutional Court, "the right of reply in the broad sense is not deemed in general to unconstitutionally restrict the freedom of expression and the freedom of the press."

I disagree with the interpretation of press publicity underlying the CCAm and the majority Decision, as in a constitutional system tolerating and securing the multitude of opinions, the publicity of the press makes it possible for affected persons – typically public actors – to articulate their opinions and challenge others' ones. In a democracy, the diversity of the press market results in a competition of mass media. Opinions and value judgements are expressed on events of public interest, which are usually related to public actors. The competition resulting from the diversity of the press market makes it an elementary interest of the mass media to report on such events of public interest, and to publish opinions and evaluations relating thereto. In this approach, it is not the "excessive power" of those who dispose over the mass media that citizens are to be protected against. Instead, emphasis is to be put on the freedom of people interested in public affairs and taking part in related debates in choosing from the opinions on the market.
According to the consistent practice of the Constitutional Court, the freedom of the press is primarily guaranteed by the non-interference of the State in respect of content. In principle, this makes it possible for all opinions existing in society to be published in the press; the Parliament has the legislative duty to prevent the creation of media monopolies. [Cf.: Decision 37/1992 (VI. 10.) AB, ABH 1992, 227, 229-230; Decision 36/1994 (VI. 24.) AB, ABH 1994, 219, 223; Decision 13/2001 (V. 14.) AB, ABH 226, 230] Consequently, in the case of plurality in the press, the planned regulation of the right of reply would result in an unjustified State interference with the freedom of the press (editing).

2. My second objection is related to the proposed fine usable for public purposes.

I hold that the institution of the fine usable for public purposes is unnecessary. The fine usable for public purposes related obligatorily to the right of reply shares the constitutional evaluation elaborated on the right of reply. In my opinion, the legal remedies provided for in Section 84 para. (1) of the CC – and in particular the institution of damages – guarantee at present an adequate level of protection against injuries (violation of the good standing of one's reputation). Introducing and institutionalising an obligatory fine usable for public purposes – in addition to not being related to the compensation of the injured party – opens a significant gap in the shield created by the Constitutional Court with a view to guaranteeing the enforcement of the freedom of expression. According to the Constitutional Court, "The freedom of expression – as a constitutional fundamental right – enjoys enhanced protection, and it may only be restricted by the external limits of safeguarding human dignity and the rights related to honour and reputation". [Decision 33/1998 (VI. 25.) AB] Such "external boundaries" were mentioned in an early decision of the Constitutional Court: "… The freedom of expression has only external boundaries: until and unless it clashes with such a constitutionally drawn external boundary, the opportunity and fact of the expression of opinion is protected, irrespective of its content. In other words, it is the expression of an individual opinion, the manifestation of public opinion formed by its own rules and, in correlation to the aforesaid, the opportunity of forming an individual opinion built upon as broad information as possible that is protected by the Constitution. The Constitution guarantees free communication – as an individual behaviour or a public process – and the fundamental right to the freedom of expression does not refer to the content of the opinion. Every opinion, good and damaging, pleasant and offensive, has a place in this social process, especially because the classification of opinions is also the product of this process…" [Decision 30/1992 (V. 26.) AB, ABH 1992, 167, 178-180]. The same decision also established close links between the freedom of expression and the freedom of the press. "In respect of the freedom of the press, the freedom of expression is given effect in a unique manner. The State must guarantee the freedom of the press having regard to the fact that the 'press' is the pre-eminent tool for disseminating and moulding views and for the gathering of information necessary for the formation of opinion. As the right to the freedom of the press can be derived from the "mother right" of the freedom of expression, the pre-eminent status conferred upon the freedom of expression applies to the freedom of the press insofar as it serves the former constitutional fundamental right. The press is an instrument of information, not merely one of free expression since it plays a basic role in the process of gathering the information necessary for the formation of opinions. Article 61 para. (1) of the Constitution, too, enumerates next to each other the right to the freedom of expression and the right of access to and dissemination of data of public interest." (ABH 1992, 227, 229).

In my opinion, the above pre-eminent values are directly endangered by the introduction of the institution of the "fine usable for public purposes". It introduces a new legal consequence – otherwise incompatible with the conceptual and institutional system of the CC – the mere prospect of which is an unnecessary restriction in the form of a high barrier built in the way of the freedom of expression and the freedom of the press.

As regards the fine usable for public purposes, the position that its application represents the "disapprobation of society" cannot be defended, either. In my opinion, one cannot prove the hypothesis that, if the court establishes that an opinion or value judgement published in a daily paper, periodical, radio or television violated one's

inherent rights, the disapprobation of society is also automatically expressed. The reason for this is the very fact that in democracies, which acknowledge and guarantee the multitude of opinions, a consensus is hardly ever formed in any matter of public interest due to the subjective judgement thereof. (A marginal note: the difference between stating facts and expressing opinions may raise further concerns for the judiciary. Section 3 of the CCAm provides for the application of the rules of the procedure of rectification in the press to the procedure of publishing replies. However, the courts could hardly apply the rules of the Code of Civil Procedure on rectification in the press, which are focused on the verification of a specific statement of facts.)

The "chilling effect" on the freedom of the press would be reinforced by the planned regulation on applying the fine usable for public purposes. This manner of regulation is, on the one hand, rigid, allowing no derogation ["… If the violation of rights was performed through a daily paper, magazine (periodical), the radio or the television, the court shall order the perpetrator to pay a fine usable for public purposes …"] and, on the other hand, it eliminates all restrictions, opening up the way for the free discretion of the court. (" … The amount of the fine usable for public purposes shall be fixed at a level suitable for preventing the perpetrator from committing further acts of violation.") All the above may lead to the danger of the planned sanction restricting directly and in a perceptible manner the enforcement of the freedom of expression and the freedom of the press, which are of fundamental importance in respect of the existence and operation of a democratic system.

Consequently, the Constitutional Court should have interpreted the last two sentences, as quoted, in Section 84 para. (2) of the CC, introduced by Section 2 of the CCAm, in a unified manner, with due regard to the interrelation of the sentences, regardless of the fact that the petitioner requested the establishment of the unconstitutionality of only the last sentence. I cannot accept the exceptionally rigid interpretation of being bound to the petition as presented in the Decision (isolating three sentences of a paragraph), and I hold that it reflects a false interpretation of the Constitutional Court's own role. Treating the two sentences (which, in my view, belong together) as a single unit in respect of content could never lead to the conclusion suggesting in essence that the prescription of the fine usable for public purposes is a necessary restriction in proportion with the injury caused.

I hold that restricting the freedom of the press through the regulation challenged in the petition – with due regard to the other guarantees protecting reputation and human dignity – is unnecessary and therefore unconstitutional.
Budapest, 4 December 2001

Dr. László Kiss
Judge of the Constitutional Court

Dissenting opinion by Dr. István Kukorelli, Judge of the Constitutional Court

I agree with the statement made in the holdings of the Decision about the unconstitutionality of the rule on the right of reply as introduced by Section 1 of the Act of Parliament on the amendment of Act IV of 1959 on the Civil Code, adopted at the session of the Parliament on 29 May 2001 (hereinafter: the CCAm).

I do not agree, however, with the statement that the only ground for the decision is the test of proportionality. It follows from the practice of the Constitutional Court emphasising the special constitutional protection of the freedom of expression that the legal institution of reply as envisaged by the legislature would restrict the freedom of the press without a pressing need to do so.
Nor do I agree with the position of the Decision, extending beyond the actual case, that the right of reply is not unconstitutional in general, since it is a necessary restriction of the freedom of the press for the purpose of protecting human dignity and reputation.
I hold that the failure of the legislature to define in the Act the upper limit of the fine usable for public purposes, obligatory in the case of publishing a reply, is also unconstitutional.

1. By introducing the legal institution of reply in Section 1 of the CCAm, the legislature regulates the contents of press products and radio and television programmes by obliging editors and broadcast providers to publish counter opinions and value judgements. The constitutionality of such an interference with the freedom of the press in terms of content is to be examined on the basis of the *tests of necessity and proportionality*. In the course of the procedure, the Constitutional Court should take into account the fact that the freedom of the press shares the special protection enjoyed by the freedom of expression, and thus it has priority over nearly all other rights.

In my opinion, it is a disputable statement in the present Decision that the restriction of the freedom of expression and the freedom of the press is possible within a limited scope “when a political debate or the criticism of the State is at stake”, but greater restriction is acceptable in cases where “the role of the press in protecting democracy manifests itself to a very limited extent or not at all”.According to the Decision, the examination of the constitutionality of the right of reply falls into the latter category.

The test applied earlier by the Constitutional Court in the examination of the constitutionality of the rules on commercial information – granting constitutional protection for business advertisements, but acknowledging in a wider scope the necessity of State interference in the case of such advertisements – is not applicable when assessing the constitutionality of the legal institution of reply.
“The Constitution guarantees free communication – as individual behaviour or a public process – and the fundamental right to the freedom of expression does not refer to the content of the opinion.” [Decision 30/1992 (V. 26.) AB, ABH 1992, 167, 179] Consequently, the expression of one’s opinion, no matter whether private communication or political discourse or criticism, enjoys special constitutional protection, irrespective of content. The Constitutional Court granted extra protection to the freedom of expression on account of it being an indispensable tool of one’s self-expression as well as of the free development of one’s personality, and for the purpose of facilitating one’s participation in the democratic society. As the aim of commercial information is usually the presentation of certain goods and the promotion of purchase, rather than self-expression or participation in democratic discourse, in the case of advertisements State interference within a wider scope may be deemed constitutional. However, in the case of the entry into force of Section 1 of the CCAm, the institution of reply would have to be applied not only to opinions or value judgements on so-called commercial information, but also, for example, to any opinion relating to subjects of public interest and affecting politicians and public actors (i.e. statements that fall into the category of political debates), as well as to value judgements of a private nature if and when they violate any personality right.

Consequently, the fundamental rights test, guaranteeing the special protection of the freedom of expression and reinforced several times by the Constitutional Court, should have been used in the Decision as the basis of assessing whether there was a pressing need to introduce the right of reply, or the provisions in force of the Civil Code and the Criminal Code offered adequate protection in the case of injuries to personality rights.

2.1. According to the Decision, the right of reply in the broad sense, i.e. rectification in the press applicable to the statement of facts and the right of communicating a counter opinion (right of reply) together constitute a necessary restriction of the freedom of the press. Since during the preliminary constitutional review the Constitutional Court was able to examine only the constitutionality of the right of reply introduced by the CCAm, the present dissenting opinion shall not address the issue of the constitutionality of the current regulation on the legal institution of rectification in the press.

On the basis of Article 61 para. (2) of the Constitution, the Republic of Hungary recognises and respects the freedom of the press. The State must guarantee this freedom having regard to the fact that the press is the pre-eminent tool for disseminating and moulding opinions. The freedom of the press is primarily guaranteed by the State's non-interference in terms of content; this is ensured, for instance, by the prohibition of censorship and the opportunity to freely establish newspapers. Through this self-restriction, the State makes it possible, in principle, for the whole spectrum of opinions existing in society, as well as for all information of public interest, to appear in the press. [Decision 37/1992 AB, ABH 1992, 227, 229-230]

The legislator emphasises in the general reasoning of the Bill of the CCAm that the introduction of the legal institution of the right of reply is a regulation binding the press the purpose of which is to protect the “constitutional values of the right to human dignity and the right to the good standing of one’s reputation”. However, the restriction is actually aimed at the reinforced protection of personality rights. Personality rights (and in particular the right to the good standing of one’s reputation) – no matter how closely related to the fundamental right to human dignity guaranteed under Article 54 para. (1) of the Constitution – are not identical with it. The right to human dignity is one of the expressions used to designate the “general personality right” [Decision 8/1990 AB, ABH 1990, 42, 44]. The single rights originating from the mother right of the general personality right, and thus – among others – the right to the good standing of one’s reputation may only be restricted on the basis of the tests of necessity and proportionality. Although the inherent rights are the ones to be considered the most serious limitations upon the freedom of the press, it must also be examined when assessing the balance between the fundamental rights whether the limitation applied by the legislature is absolutely necessary for the protection of personality rights, or the adequate protection of personality can be reached by way of other tools restricting the freedom of the press to a lesser extent.

With the introduction of the right of reply, Section 1 of the CCAm restricts the freedom of the press for the purpose of protecting personality rights, and as there is no forcing necessity to apply such a restriction, I hold that *it is unnecessary, and therefore unconstitutional.* Today, our legal system offers several legal remedies for those whose inherent rights suffer an injury. On the basis of the Civil Code a civil lawsuit may be started by anyone whose inherent right has suffered an injury (e.g. by the statement of a true or false fact, or by the use of an offensive expression). In the course of the procedure he may demand – among others – a court declaration of the infringement; the abandonment of the infringement and prohibiting the perpetrator from committing further infringement; proper amends, the termination of the

injurious situation, the restoration of the condition preceding the violation or the awarding of damages. [Section 84 para. (1) of the CC]
Even today, Section 84 para. (1) item c) of the CC offers an opportunity to oblige the party having committed the injury to make amends to the party whose personality rights were injured, in the form of a declaration or by any other suitable means, and the court in charge of the action may ensure in its judgement adequate publicity for such amends by, or at the expense of, the perpetrator.

The law on the press offers special remedy for those about whom the printed or electronic press has published or disseminated false facts or distorted true facts. However, rectification in the press is only applicable to statements of facts.

In addition to civil law measures, the injured party may also use the tools of criminal law for the protection of his honour and reputation. While libel specified in Section 179 of the Criminal Code may only be committed by stating an (alleged) fact or using an expression directly referring to one, the statutory definition of defamation (Section 180 of the Criminal Code) may be applied to anyone using an expression suitable for impairing honour.

Regardless of whether civil law claims are enforced or criminal law protection is used by the injured party, one cannot ignore the principle first declared by the Constitutional Court in Decision 36/1994 (VI. 24.) AB, namely that “due to the high constitutional value of the freedom of expression in public matters, the protection of the honour of public offices and public officials as well as other public actors may justify less restriction on the freedom of expression than the protection of the honour of private persons”. (ABH 1994, 219, 231).
In Section 1 of the CCAm, the legislature establishes the right of reply without due regard to the differences between expressing opinions about *public personalities and private persons*. In the case of opinions and value judgements affecting public personalities and public affairs, the institution of reply, as a tool of protecting personality, can be deemed necessary to even a lesser extent. Politicians and other persons acting in public life always have the opportunity to present through the press their views or remarks on others’ opinions.

2.2. According to the Decision, the introduction of the institution of reply is also justified by the fact that through the right of reply, the public can gain information on the affected person’s own opinion, and it “supports those who are otherwise in a weaker position than those who dispose over the mass media”.

Section 1 of the CCAm introducing the right of reply tries to apply to the printed press the requirement concerning the public television and radio as determined by the Constitutional Court in Decision 37/1992 (VI. 10.) AB, namely that the opinions present in society should be presented in a comprehensive and balanced manner. However, the above specific solution had been approved by the Constitutional Court solely on the ground of the limited number of available frequencies and only in the case of the national public television and radio, which enjoy a monopoly.

The American Supreme Court also evaluated the constitutionality of the requirement of balanced information on the basis of whether it was applied to the electronic media or the printed press. In the Red Lion Case, concerning the right of the injured party to ask for air time to reply to a defaming statement previously broadcast on the radio, the Supreme Court supported the principle of balanced information mainly with reference to the limited supply of frequencies, pointing out that in a matter of public interest all relevant opinions have to be

presented. [Case Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969)]. However, in the Tornillo Case, the Supreme Court found that it was a violation of the freedom of the press – and in particular of the freedom of editing – that the law of Florida required the press product to publish, free of charge, a reply made by a candidate for a political position if he was criticised in the press. [Case The Miami Herald Publishing Co. v. Pat Tornillo, Jr., 418 U.S. 241 (1974)]

Publishing opinions and views in the printed or electronic press is a more and more frequent way of exercising the right to the freedom of expression. However, press products are not merely neutral forums of opinions where individuals are entitled to present their views even against the will of the editorial staff. Just like Article 10 of the European Human Rights Convention cannot be interpreted as automatically securing a right for any person or organisation to have a certain broadcasting time on the television or radio to disseminate their views (Kritikai elemzés az Emberi jogok európai egyezménye 10. cikkének hatóköréről és alkalmazásáról (Critical analysis of the scope and application of Article 10 of the European Human Rights Convention), Bírósági Határozatok Emberi Jogi Füzetek (Court Reports Human Rights Booklets) 1997/1, 9), *the Hungarian Constitution does not grant to anyone the right to disseminate his opinions or views through a press product selected by him*. However, on the basis of Article 61 para. (2) of the Constitution, anyone may freely establish a newspaper and thus express his views in the press product concerned. Article 61 para. (2) of the Constitution granting the freedom of the press covers not only the prohibition of censorship and the freedom of establishing a newspaper, but the autonomy of editing as well. Therefore, I fully agree with the statement, made in the petition of the President of the Republic, that "obliging the press to publish specific opinions and value judgements is a serious restriction of the freedom of editing based on the editors' free conviction."

Consequently, the legal institution of reply is an unnecessary restriction of the freedom of the press guaranteed in Article 61 para. (2) of the Constitution, and therefore Section 1 of the CCAm introducing the right of reply is unconstitutional. As a result, I have not examined whether the CCAm uses the appropriate and least restricting tool in order to increase the efficiency of protecting personality rights. In addition to holding that the institution of reply is unconstitutional, I wish to emphasise that the fair operation of the press is a desirable objective. However, this objective can only be achieved with tools beyond the realm of law, e.g. tools of press ethics, rather than with administrative and legal tools.

3. 3. In my opinion, the comparative analysis of the laws of various countries also shows that the institution of reply used for the purpose of rectifying opinions is an exceptional legal phenomenon unknown in most democratic countries. Countries of the common law system, such as the United Kingdom, the United States and Australia do not grant the rights of reply and rectification. Although the institution of rectification in the press is used in most of the countries applying the continental legal system, as referred to in the Decision itself, in many European countries including Germany, Switzerland and – following a decision made by the Spanish Constitutional Court in 1989 – in Spain, furthermore, in Austria and the Netherlands, only statements of facts but not opinions and value judgements may serve as the basis of rectification.

Several international human rights documents are referred to in the Decision in order to support the claim that the right of reply is an accepted form of restricting the freedom of the press. However, in my opinion, no international treaty on human rights may serve as a basis for diminishing the protection of rights existing at a higher level in domestic law. If the

Constitution sets a higher standard for the protection of rights and guarantees more protection for a certain right, the States Parties to an international treaty may not derogate from the achieved level of the protection of rights with reference to the international law document.

4. I agree with the Decision being restricted to the constitutional review of the provisions specified by the President of the Republic (the part of Section 1 of the CCAm introducing Section 79 paras (2) and (3) of the CC, and the part of Section 2 of the CCAm introducing the last sentence in Section 84 para. (2) of the CC).
Nevertheless, I hold that the lack of a statutory definition of the upper limit of the obligatory fine usable for public purposes is unconstitutional. The last sentence in Section 84 para. (2) of the CC introduced by Section 2 of the CCAm restricts the freedom of the press in an unconstitutional manner, because the application of a vague amount of fine usable for public purposes may have *the effect of self-censorship, repressing the will* to publish critical value judgements and opinions. This is an unconstitutional restriction of the freedom of the press, and in particular of the freedom of editing.

Budapest, 4 December 2001

Dr. István Kukorelli
Judge of the Constitutional Court

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