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honor concept
- with particular regard to
constitutional requirements**

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The legal history of the duality of honor concept

- with particular regard to constitutional requirements

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Abstract

In the judicial practice of defamation and slander, the double perception of honor prevails. In the context of the factuality, the judicial practice insists on an own concept of honor, despite of the predominancy of constitutional requirements. However, this perception in the significant part of the manifestations does not agree with the concept of honor of the protected legal interest. The Supreme Court confirmed this duality in a number of decisions, emphasizing that the allegation (rumor etc.) from the criminal act, the contention must be examined in itself and not in a fundamental right relation (Judicial Decision No. 2013.8.204). In my view, besides that the legal practice attributes two kinds of meanings to the concept, other concerns can also be highlighted with this approach.

Introduction

During the examination of the defamation's and slander's legal practice, the duality of the concept of honor is drawn up in front of us. It is undoubtedly reflected in the current practice of law that there can be found a difference and separation between the concept of honor named in the facts and the one which is the subject of the protected legal interest.¹ The latter legal institution agree with the constitutional requirements, while on the basis of the criminal act definition of honor the court examines the implementation searched for borderline of suitable for damaging honor in society's general perception.² However, since the boundary used within factuality, conflicts with the *test of necessity and proportionality* in the event of a number of manifestations and the constitutional practice, in order to comply with constitutional

¹ E.g. Judicial Decisions No. 2013.8.204; 2020.4.96. Supreme Court Decisions No. 2019.01. B2; 2019.02.B3.

² BH 1998.9.412: The question in suitable for damaging honor is not the aggrieved party's (subjective) judgment, but the general (objective) perception what was formed by the society has significance.

requirements the criminal court practice excludes the criminality in the absence of danger to society

1. in the performance of rights and obligations arising from the exercise of professional activities, in this context opinions exempt from unnecessary abuse and disparagement,
2. in manifestations and statements made by the client in order to clarify the matters in pending proceedings before the authorities, within the limits of their rights exempt from unnecessary abuse and disparagement, as well as
3. in manifestations made in public debates.

However, the question arises as to how the disproportionately shifted practice of our current legal practice has developed from the legal historical point of view in the terms of danger to society.

Legal historical development

The legal regulation of the acts defamation and slander considered in the Csemegi Codex and in Act XLI of 1914 as extremely detailed has been transformed by the Act V of 1961, creating a new *terminus technicus*: a fact 'suitable for damaging honor'. With the new term the legislator endeavored not only to connect the facts of defamation and slander but also to simplify the legal definition.³ It can also be deduced from the ministerial justification that the purpose of the bill was to connect honor and the concept of suitability for damaging honor.⁴

“The bill does not distinguish between defamation and slander on the basis that one of the acts eg. it can make the victim for byword and the other is just dishonoring or discouraging it. No serious differentiation can be made between a fact capable of provoking public contempt and dishonoring or degrading facts. Therefore, the legal acts of defamation and slander in the proposal use the same expression to indicate that conduct is directed against an honor (“suitable for the damage of honor”).”⁵

As a legal precedent, the Act II of 1950 should be briefly referred to since it entered into force the legal institution of danger to society. The amendment of the Criminal Code of 1961 allowed a new form of facts through this legal institution, disregarding thereby the criminal act

³ Ministry of Justice: *Magyar Népköztársaság Büntető Törvénykönyve*. Second edition, Közgazdasági és Jogi Könyvkiadó. Budapest, 1962. p. 453.

⁴ Ibid.

⁵ Ministry of Justice op. cit. 453.

declaration dating back to the Csemegi Codex that manifestations made in pending cases before the authorities shall be precluded of culpability. By the fact that, failing a legal regulation the ministerial justification ordered to exclude the above-mentioned ground for preclusion of culpability in the absence of illegitimacy,⁶ it unwillingly separated the newly intended concept set out in the facts and the protected legal interest. Furthermore, in view of the fact that until the creation of the new criminal facts the legal practice also excluded culpability of defamation committed during the performance of duty in the absence of illegitimacy⁷ – because the ministerial justification and the law did not dispose this ground of preclusion –, the law enforcement practice did not change its practice.⁸

As a result, the victims of the new regulation have become the grounds for excluding culpability which was earlier defined by the law. From the Act XLI of 1914 the criminal law excluded culpability of the manifestations made in pending cases before the authority.⁹ However the Act V of 1961 broke with this rule and judicial practice from the effective date of the new law applied the ground for exclusion by extending the range of activities lacking danger to society.¹⁰ Nevertheless, the ministerial justification did not include the mentioned ground to exclude culpability of defamation and slander. It also did not deal with the problem of the fact that the new criminal act unintentionally separated the concept of honor lacking danger to society and the concept of factuality honor. The Ministerial Justification is quoting the BHÖ Point 406 highlighted that “the applicable law has excluded the establishment of a defamation or slander if the usage of the representation (expression directly referring to such a fact) in pending cases before authorities during the negotiation in words or became in case file referring to the case and the client; the rule is also the same in the case of other statements made to the client or his/her representative, provided that the declaration is related to the matter and required for the client”¹¹. According to the proposal, there is no need for the legal codification of this ground, because the client’s and his/her representative’s exercise of rights in pending cases before the authorities in the absence of illegitimacy excludes the establishment of a crime, “because the actions of the client or his/her representative in a pending case before an authority which fall within the scope of the exercise of their rights are not illegal and the absence of illegitimacy

⁶ Ministry of Justice op. cit. 454.

⁷ Judicial Decision No. 1955.11.1070.

⁸ Judicial Decision No. 1966.5.4857.

⁹ Cf.: Act V of 1878 266. §; Act XLI of 1914 17. §

¹⁰ Judicial Decisions No. 1967.7.5357

¹¹ Ministry of Justice op. cit. 453-454.

also precludes the establishment of a criminal offense according to the general doctrines (...).¹² However, the ministerial argument did not take into account that with the new concept of “suitable for damaging honor” it has put the concept of honor in the criminal act which is defined at the beginning of its justification.¹³

Under the fifth footnote quoted justification it seems that the legislator would like to connect the concept of honor and suitable for damaging honor – thus, the factual and the illegal acts –, however, the ministerial justification does not include that the factuality of the act is missed in the absence of illegality. Nevertheless, from the entry into force of the new criminal act, the legal practice invariably excluded in the absence of illegitimacy the culpability of manifestation carried out during the duty performance.¹⁴ With this legal practice, the anomaly of the new criminal act has become the duality of the honor concept. By the fact that the legal practice perspective of the factuality and the danger to society differently assessed the manifestations that had been articulated during the performance of duty and the pending cases before the authorities, the legal practice separated the concept of ‘suitable for damaging honor’ and the concept of honor what is determined by the protected legal interest.

As explained, since the entry into force of the Act V of 1961, the criminal acts of defamation and slander include the fact of ‘suitable for damaging honor’. However, a number of sources of law have had an effect on which manifestations could be considered suitable for damaging honor since the entry into force of the Criminal Code of 1961. Nevertheless, from the legal historical point of view primarily the constitutional revolution that took place around the change of regime and then the Resolutions of the Constitutional Court set up in 1989 in order to interpret fundamental rights had the greatest impact on the assessment of illegitimacy of the statements.

Constitutional requirements which expanded the grounds for the preclusion of danger to society

The Act XXXI of 1989 which amended the Constitution and entered into force on 23 October 1989 declared the constitutional core of values protected by the acts of defamation and slander: human dignity and right to reputation. By expanding the meaning of these fundamental rights

¹² Ministry of Justice op. cit. 454.

¹³ The concept of honor in the ministerial argument: „The honor of man, their properties and behavior is the attack of a favorable judgment in the social environment.” (Ministry of Justice op. cit. 451.)

¹⁴ Judicial Decisions No. 1966.5.4857

and of the concurring right freedom of expression, the Constitutional Court progressively formulated constitutional requirements on the illegitimacy of those two examined criminal acts. The so-called ‘*test of necessity and proportionality*’ on the restriction of fundamental rights was framed by the Body during its relatively early practice under Resolution No. 30/1992. (V. 26.). However, until the entry into force of the Fundamental Law, the cited doctrine merely functioned as an *erga omnes* interpretation of the Constitutional Court.

The protected legal interest and the circle of the passive subjects were presumably most influenced by the Resolution of the Constitutional Court No. 36/1994. (VI. 24.). This Resolution has been passed in accordance with the practice of the European Court of Human Rights.¹⁵ With its publication, the act ‘*violation against an authority or a public official*’- that had been determined in Section 232 of Act IV of 1978 - was stated as unconstitutional and was annulled. That act was part of the Hungarian jurisprudence since the entry into force of Act V of 1961¹⁶. Since the above cited Resolution, the limits of possibilities to express opinions have changed in the course of numerous civic dialogues. At the same time, the scope of passive subjects in the acts of defamation and slander was expanded by renewing a resolution that had been applied for more than three decades. Regarding the background of the Resolution, it is necessary to emphasize that Section 52 of Act XVII of 1993 amended Section 232 of the Criminal Code in effect at that time, adapting herewith the scope of criminal conducts as well as raising the sentence applied.

However, shortly after that amendment the European Convention of Human Rights was promulgated in Act XXXI of 1993¹⁷ and made the jurisdiction of the ECHR binding on the Convention and on all matters related to the interpretation and implementation of its Additional Protocols.¹⁸ Accession to the Convention confirmed the Constitutional Court's aim of establishing conformity between the judgements of the ECHR and the domestic practice of fundamental rights, which led to the qualification of act of ‘*violation against an authority or a*

¹⁵ The ECHR indicated in the case of *Lingens v. Austria* that [t]he limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. [F]reedom of political debates is at the very core of the concept of a democratic society. (Judgement of 8 July 1986 in *Lingens v. Austria*, application no. 9815/82, par. 42.) The Court subsequently upheld its findings in the case of *Oberschlick v. Austria*: the limits of acceptable criticism are accordingly wider with regard to a politician acting in his public capacity than in relation to a private individual. (Judgment of 23 May 1991 in *Oberschlick v. Austria*, Application no. 11662/85, sec. 59).

¹⁶ Act V of 1961, Sections 158–159.

¹⁷ The European Convention of Human Rights shall be applied from the date specified in Section 5 of Act XXXI of 1993.

¹⁸ Paragraph b Section 3 of Act XXXI of 1993.

public official' (promulgated in Section 232 of Act IV of 1978) as unconstitutional. As stated in the Resolution of the Constitutional Court in relation to the facts concerned as unconstitutional:

„- defamation and slander of public authorities are punished in the same wide way as acts against other persons, which is clearly contrary to the principles prevailing in the permanent case law of the ECHR;

-in public affairs the freedom of expression expressing judgment is punished which is the unnecessary and disproportionate restriction of the constitutional fundamental right;

-in relation to statements of facts it does not distinguish among true and untrue, including those knowingly false and false as a result of negligent infringement arising in professions or occupations; although freedom of expression shall be constitutionally restricted by criminal law instruments only in the latter cases.”¹⁹

The Constitutional Court formulated as a further constitutional qualm that ‘Due to the constitutionally high value of freedom of expression in public affairs, the protection of honor of public offices, persons taking on public offices, as well as of other actors in public life, may less restrict freedom of expression than the protection of private individual’s honor.’²⁰ As a result with this statement, the Constitutional Court forced the criminal court to transform its legal practice of defamation and slander. However, instead of connecting the notion of factuality and protected legal interest embodied by honor with reforming the own practice of the judicial practice, it extended the grounds for preclusion of danger to society with manifestations expressed in public debates, thereby questioning the purpose of criminal law. This development of the judicial practice can be seen in many decisions of the Supreme Court.²¹ As the Judicial Decision No. 2013.8.204 also explained, the statement of facts suitable for damaging honor is not illegitimate if it is subject to the freedom of expression and is expressed in reference to an authority or official person and the politician of the public in view of this quality. As it can be deducted from the cited Decision of Supreme Court, following the Constitutional Court Resolution No. 36/1994. (VI. 24.) the judicial practice of defamation and

¹⁹ Constitutional Court Resolution No. 36/1994. (VI. 24.); Constitutional Court Decision No. 1994. 219., 228.

²⁰ Constitutional Court Resolution No. 36/1994. (VI. 24.); Constitutional Court Decision No. 1994, 219., 231.

²¹ Judicial Decisions No. 2013.8.204; 2020.4.96. Supreme Court Decisions No. 2013.09.B16, 2019.01.B2; Bfv.1052/2018/6.; Bfv.51/2019/5.; Bfv.950/2019/3.

slander has transformed. However, the manifestations under the issue of factuality were still not examined in the context of fundamental rights by courts.²²

Apparently from what has been explained, the constitutional revolution which could be described as the last stage in the development of our legal history, had a significant impact on the protected legal interest of defamation and slander. The regulation of acts of defamation and slander stems from the necessary competition between the right to human dignity and reputation on one side and the right to freedom of expression on the other side, thus the conflict of fundamental rights. Based on this conclusion – disputing those views that human dignity would be the protected legal interest of the examined acts – right to human dignity and reputation as a protected value can only be defined within limits for the sake of the right to freedom of expression according to the test of necessity and proportionality. From my point of view, in determining the legal interest of the examined acts, it is necessary to interpret human dignity in its general dimension of personal rights. The acts of defamation and slander do not provide protection against all expressions of opinion, thus its inviolable dimension representing an absolute limit²³ is unsuitable for defining the value in question.²⁴ Human dignity and right to reputation limited this way are called honor, which is the protected legal interest of slander. However, on the grounds that contrary to slander, defamation provides criminal protection only against facts suitable for damaging honor, in the case of this act I find it necessary to further narrow the legal interest within honor. In accordance with the summary thus expressed, in my point of view the protected legal interest of defamation is *social esteem* whilst slander's is the protection of *honor*.

The Constitutional Court, established in order to interpret the Constitution²⁵ ruled several *erga omnes* decisions on the protected value of the defamation and slander apart from the above-mentioned Constitutional Court Resolution No. 36/1994. (VI. 24.), what configured the constitutional foundations of the grounds for excluding culpability of manifestations affecting public affairs in Hungary. However, the primary importance of these decisions shall be sought under the examination of danger to society. According to the practice of the Supreme Court: 'In

²² Judicial Decision No. 2013.8.204.

²³ The summary of Balogh Zsolt reads 'human dignity, the legal group that establishes the legal status of a person is unlimited as it is part of human quality'. (BALOGH Zsolt: *Alapvető jogok és kötelességek. Alapjogok korlátozása*. In: (ed: DRINÓCZI Tímea and JAKAB András: *Alkotmányozás Magyarországon 2010-2011. I. Pázmány Press Budapest-Pécs 2013. 138.*).

²⁴ S. the two dimensions of right to human dignity appearing in the practice of the Constitutional Court in the next subsection.

²⁵ Paragraph g Section 1 of Act XXXII of 1989.

order to realize the notion of statement of facts (rumor etc.) from the criminal act approach, the contention must be examined in itself and not in a fundamental right relation²⁶. Namely, the regulations of criminal law must be in conformity with the Constitution – later with the Fundamental Law – as well as with the Resolutions of the Constitutional Court interpreting it. As a result of the expectations expressed this way, the acts of defamation and slander also have to be in consensus with the constitutional requirements, otherwise the unconstitutional facts should have been annulled in part or fully by the Constitutional Court.²⁷

Conclusion

In the judicial practice of defamation and slander, the double perception of honor prevails. In the context of the factuality, the judicial practice insists on an own concept of honor, despite of the predominancy of constitutional requirements. However, this perception in the significant part of the manifestations does not agree with the concept of honor of the protected legal interest. The Supreme Court confirmed this duality in a number of decisions, emphasizing that the allegation (rumor etc.) from the criminal act, the contention must be examined in itself and not in a fundamental right relation²⁸. In my view, besides that the legal practice attributes two kinds of meanings to the concept, other concerns can also be highlighted with this approach. The question arises, whether it is not contrary to the aim of regulation of the criminal law if a crime qualifies a significant number of constitutionally accepted terms and statements of facts examined in criminal proceedings as factual? Does the current legal practice meet the requirement of *ultima ratio*? How does the *ultima ratio* nature of criminal law prevail if legitimate expression of the wider tolerance is considered as factuality? The Constitutional Court has already anticipated in its Resolution No. 36/1994. (VI. 24.) that in the future, it will be the law enforcement practice's task to be responsible for developing that „practicing the freedom of expression in which case of public figure excludes the illegality of the act“²⁹. However, in contrast to the current legal practice, in my opinion it would be more practical if the legal interest and the criminal conduct of defamation or slander would be consistent, in which case the lawful manifestation groups set out in the introduction would be neither illegitimate nor factual.

²⁶ E.g. Judicial Decisions No. 2013.8.204; 2020.4.96. Supreme Court Decisions No. 2019.01. B2; 2019.02.B3.

²⁷ Subsection 1 Section 41 of Act CLI of 2011.

²⁸ E.g. Judicial Decisions No. 2013.8.204; 2020.4.96. Supreme Court Decisions No. 2019.01. B2; 2019.02.B3.

²⁹ Constitutional Court Resolution No. 36/1994. (VI. 24.), Constitutional Court Decision No. 1994. 219., 231.