# 38 The *Ungváry* Case before the Hungarian Courts and the European Court of Human Rights

*András Koltay*[*]

## 38.1 Prologue: The Constitutional Standard Regarding the Protection of Public Figure's Reputation in the Hungarian Legal System

The Hungarian Constitutional Court's (hereinafter: CC) Decision 36/1994. (VI. 24.) provided for the theoretical foundations of the issue of the protection of public figures for the first time in the Hungarian legal system, 4 years after the political regime change. The decision was based on a motion challenging the constitutionality of the crime of 'defamation of authorities or official persons', a crime specified in the proposed Article 232 of the Criminal Code. The new delict defined by Parliament – which did not enter into force, as the President of the Republic refused to sign the proposed law, which was then struck down by the CC – threatened those persons who use expressions capable of harming the honour of authorities with more severe punishment than that dispensed for the crime of defamation committed against other private persons. The provision offered an excellent opportunity for the CC to clarify its theoretical position on the essence of the freedom of speech, while ruling on the subject matter at hand.

The provision was found unconstitutional and was struck down because the CC established that the freedom of expression and the freedom of the press are prerequisites for the existence and development of a democratic society, and therefore constitute fundamental rights of utmost importance.[1] In upholding this right, further protection is extended, as:

> The possibility of publicly criticising the activity of bodies and persons fulfilling state and local government tasks, furthermore, the fact that citizens may participate in political and social processes without uncertainty, compromise and fear, is an outstanding constitutional interest.[2]

* Associate professor, Pázmány Péter Catholic University, koltay.andras@jak.ppke.hu.

1 Decision 36/1994. (VI. 24.), Statement of Reasons, s. II/1.

2 Decision 36/1994. (VI. 24.), Statement of Reasons, s. III.1.

As such, while the constitutionality of protecting the honour and reputation of the above-mentioned persons by means of criminal law may not be excluded, freedom of speech may be limited to a lesser extent – in comparison to private persons – in order to protect persons exercising state powers.

According to the position of the CC, the rule providing extended protection to the rights of authorities or official persons was unconstitutional, because:

- it aimed to punish libel (defamation) if the victim is acting in a public authority capacity with the same scope as with regard to other victimised persons, which is clearly contrary to the principles represented in the established practice of the European Court of Human Rights (hereinafter: ECtHR);
- in public affairs, it would order the punishment of expressing opinions that represent value judgments, which is an unnecessary and disproportionate restriction of the constitutional fundamental right;
- regarding the communication of facts, it did not differentiate between true and false statements and, with regard to the latter, between intentionally false ones and those that are false due to negligence in the form of not complying with the rules of a profession or occupation, although only with regard to the latter may the freedom of expression be constitutionally restricted by means of criminal law instruments.[3]

Going further, the CC defined certain 'constitutional requirements' in respect of the applicability of the criminal law delicts of defamation and harming honour. As László Sólyom, the then president of the Court, put it: 'Whichever way we look at it, what happened was that the CC *inserted something into* the Criminal Code.'[4] According to such constitutional requirements:

> An expression of a value judgment capable of offending the honour of an authority, an official, or a politician acting in public, and expressed with regard to his or her public capacity is not punishable under the Constitution; and a statement of fact or an allegation capable of violating honour or an expression directly referring to such a fact is only punishable if the person who states a fact, or spreads a rumour capable of offending one's honour, or uses an expression directly referring to such a fact, was aware that the essence of his or her statement was false, or was not aware of its falsehood because of his or her failure to pay attention or exercise the caution reasonably expected of him/her pursuant to the rules applicable to his or her profession or occupation,

3 Ibid., s. III.

4 GA Tóth, 'A 'nehéz eseteknél' a bíró erkölcsi felfogása jut szerephez – beszélgetés Sólyom Lászlóval' (1997) 1 *Fundamentum* 40.

> taking into account the subject matter, the medium and the addressee of the expression in question.[5]

Accordingly, the expression of an opinion containing a value judgment is unlimited within the defined scope of subjects and cases, while the statement of a fact may not be punished, unless the perpetrator was aware of the falsehood thereof, or was not aware of such a falsehood due to their failure to exercise the level of due diligence that may be expected from them. This test establishing the liability of the perpetrator for deliberate lies or in the event of negligence is rather similar to – but is not identical to – the *New York Times* rule formulated by the U.S. Supreme Court.[6] Its influence on the decision of the CC was also noted by the president of the Court, László Sólyom.[7] The differences are significant: neither the Sullivan rule nor its subsequent amendments contained any sharp distinction between facts and opinions. The *New York Times* ruling was passed in a civil law suit for damages, while the decision of the Hungarian CC was adopted with regard to criminal law. The similar Hungarian standard lays down a significantly lower threshold of limitations: instead of recklessness, failure to meet the expected level of (professional) care is also sufficient.[8] This may make it hard for journalists to be acquitted from liability, as the rules of their profession require the increased verification of the given statement. It is the duty of the person making the statement to prove that their conduct was appropriate and thus provides grounds for acquittal, as is general in European legal systems. The personal scope, however, is similar to that of the *New York Times* ruling: it is limited to the authorities, public officers

5 Constitutional Court Decision 36/1994. (VI. 24.), operative part.

6 The *New York Times v. Sullivan* decision, 376 U.S. 254 (1964) is one of the most frequently cited decisions in the history of the United States Supreme Court. Besides radically changing the law of defamation as applied previously, it went well beyond deciding the specific issue at hand and in part created a new interpretation and theoretical grounding of the freedom of speech as well as influencing several other legal systems. The majority opinion of the Federal Supreme Court, written by William Brennan J, pointed out that the freedom to criticise those holding public office is indispensable for the healthy development of society. The participation in democratic decision-making requires a free flow and exchange of information and opinions in respect of any events of public importance. The interest vested in the openness of debates dictates that – shifting the balance in favour of the freedom of speech – even certain false statements shall be granted protection. However, on the basis of the law of libel, no true statements may constitute legal violations. In the interest of the broadest possible freedom of communication, the decision created a new, federal-level rule: as of that point, elected public officials may not sue successfully for publishing statements made in relation to their position and harmful to their reputation, unless they can prove that the publisher (typically the press) acted with actual malice, i.e. it had knowledge that the information was false, or the information was published with reckless disregard of whether it was false or not. According to the most often cited words of Brennan J, there is 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'

7 L Sólyom, *Az alkotmánybíráskodás kezdetei Magyarországon* (Osiris 2001) pp. 481-82.

8 The measure of 'professional care' is fundamentally different from the measure applied in the *New York Times v. Sullivan* case and is much more akin to the measure of 'responsible journalism' evolving in common law systems. This, in turn, is closely related to the *tort of negligence*, see E Descheemaeker, 'Protecting Reputation: Defamation and Negligence' (2009) 29 *Oxford Journal of Legal Studies* 4, 603.

and public political figures. At the same time, this personal scope has gradually become broader, paralleling the legal development in the US.[9] (It is also worth noting that, while the decision contains a detailed description of the ECtHR case law, it does not make express mention of the *New York Times* ruling, despite its obvious influence.)

It is important to stress that the decision did not consider opinions to be beyond restriction in general; constitutional protection is only extended to opinion expressed about public figures as such. At the same time, the constitutional requirements set forth in the decision of the CC provides no guidance as to whether such opinions must have a factual basis or they can be defamatory, offensive to dignity or disproportionately exaggerated without any verifiable factual grounding. On the basis of the statement of reasons, we may conclude that the CC intended to establish that no opinion expressed about public figures as such is punishable:

> Value judgment, i.e. somebody's personal opinion, is always covered by the freedom of expression, regardless of its value, truth and emotional or rational basis. However, human dignity, honour and reputation, likewise constitutionally protected, may constitute the outer limit of the freedom of expression realised in value judgments, and the enforcement of criminal liability in the protection of human dignity, honour and reputation may not be generally considered disproportionate, and thus unconstitutional.
> According to the position of the Constitutional Court, however, value judgments expressed in the conflict of opinions on public matters enjoy increased constitutional protection even if they are exaggerated and intensified.... Even in the period of the establishment and consolidation of the institutional structure of democracy – when civilised debating of public matters has not yet taken root – there is no constitutional interest which would justify the restriction of communicating value judgments in the protection of authorities and official persons. The protection of the peace and democratic development of society does not require criminal law interference against the criticism and negative judgments of the activity and operation of authorities and officials, even if they are in the form of libellous and slanderous expressions and behaviour.[10]

That is, according to the decision, with regard to public affairs and in criminal proceedings, all value judgments enjoy protection, irrespective of 'value, truth and emotional or rational basis' (ie irrespective of whether they have factual basis or not) and, although such protec-

9 See *Curtis Publishing Co. v. Butts, Associated Press v. Walker* 388 U.S. 130 (1967), *Rosenbloom v. Metromedia* 403 U.S. 29 (1971).

10 Constitutional Court Decision No. 36/1994. (VI. 24.) Statement of Reasons, s III.2.

tion is not unlimited, in public debates the measure defined by the CC should be applied to them. Nevertheless, the differentiation between opinions has become an important factor of distinction in subsequent judicial practice. In the following sections, we'll assess the practical application of these standards by the Hungarian Courts in the *Ungváry* case.

## 38.2 THE FACTS OF THE *UNGVÁRY* CASE

The historian Krisztián Ungváry, who later became one of the defendants in the subsequent civil lawsuits and defendant of the criminal lawsuit, published a lengthy article on 18th May 2006 in the weekly *Élet és Irodalom* entitled 'The Genesis of a Process: the Dialogue Group at Pécs'. The article was concerned with the actions of the state security service against a student peace activist movement called Dialogue, which was active at the university of the city of Pécs in the 1980s, the last decade of the communist state era.

In the article, Ungváry primarily relied on the materials held in the Historical Archives of the State Security Services as a 'strictly confidential action plan', and wrote about the role of the leadership of Pécs University, including L. K., the deputy secretary of the local party committee between 1983 and 1988 and a justice of the Constitutional Court at the time of the publication of the article, in supporting the activities of the state security service. With the cooperation of the organs of the party and the state security, the Dialogue movement had been thwarted as not being in conformity with the official 'line'. Ungváry characterised the conduct of L. K. in the *Dialogue* case as 'hard line', recalling that it was L.K. who had ordered the removal of Dialogue's poster, saying 'the country needs no such ... initiatives' and had reproached one of the election candidates of the communist youth organisation for enjoying Dialogue's support. L. K. applied for a press correction against the weekly. The courts accepted his application.

On 27 May 2007 a television channel aired an interview with Ungváry about the article published in *Élet és Irodalom*, where the latter reiterated his opinion about L. K. Moreover, in the programme Ungváry called L. K. 'trash' and 'mega-trash'. In April 2008 a book co-authored by Ungváry was published on the history of the communist state security service,[11] one of the chapters of which contained a slightly amended version of the article published in *Élet és Irodalom*.

On the basis of all this L. K. filed a criminal complaint against Ungváry and launched two civil lawsuits for the protection of personality (a press correction lawsuit and a lawsuit for the protection of reputation and honour) against Ungváry and the publisher of *Élet és Irodalom*.

11 G Tabajdi and K Ungváry, *Elhallgatott múlt – A pártállam és a belügy. A politikai rendőrség működése Magyarországon 1956-1990* (Corvina 2008).

## 38.3 THE DECISIONS OF THE HUNGARIAN COURTS

In the lawsuit for press correction, the Budapest Metropolitan Court ordered the editorial board of the newspaper to publish a corrective statement (No. 19.P.23.260/2007/8.). The court cited the 1994 decision of the CC, regarded the majority of the disputed part of the article as statements of fact and established that, lacking proof, their publication constituted a legal violation. (Although, as we have mentioned, the court cited the measure of 'professional diligence', established in the decision of the CC, which would release the editorial board and the author from legal liability in a civil law context even in the event of publishing false facts, this measure was not applied by the court after all.)

On 19 February 2009 the Budapest Metropolitan Court, proceeding in the lawsuit for the protection of reputation and honour, established that the statements made in Ungváry's study published in *Élet és Irodalom*, the television interview and the book had violated the personality rights of L.K. as had the publisher by publishing the study (19.P.25.000/2007/16.). The first instance judgment established that Ungváry and the publisher had published untrue (unproven) statements injurious to L. K.'s reputation. Following the appeal against the judgment, on 13 October 2009 the Budapest Court of Appeal amended the first instance judgment and rejected L. K.'s claim on the grounds that the statements referred to had been value judgments supported by facts rather than statements of fact (2.Pf.21.082/2009/5.). At the same time, the Court of Appeal also established that Ungváry had violated L. K.'s honour and human dignity by calling him 'trash' in the television programme. On the basis of L. K.'s petition for judicial review, on 2nd June 2010 the Supreme Court amended the second instance decision (apart from the defamation also established by the Court of Appeal) and established that the article had violated the personality rights of L. K. by creating the false impression that, in the communist era, he had been a 'quasi-agent' and informer, collaborating with and writing reports to the state security services as an 'official liaison', had opposed the election of the officials of the youth organisation at the behest of the secret service and had called for a hard-line policy (Pfv.IV.20.328/2010/5.). According to the position of the Supreme Court, the article had contained unfounded statements of fact abusive to L. K. The Court ordered the plaintiffs to pay joint and several damages of HUF 2,000,000 (c EUR 6,700) and ordered Ungváry to pay a further HUF 1,000,000 (c EUR 3,350), plus interest.

The Pest Central District Court, acting as court of first instance in the criminal lawsuit, found Ungváry guilty of defamation and issued a court admonition against him. According to the court, the materials published in the article and the book were 'objectively clearly capable of injury to the honour of the private prosecutor.' At the same time, however, the court also established that the writings of the defendant resulted from academic research, and only the representatives of science are entitled to decide on academic issues. That is, the court regarded the majority of the disputed elements of the article as academic opinions,

the assessment of the validity of which was beyond the competence of the court and which did not transgress the limits which L. K. as a public figure was required to tolerate. The court only established that the defendant had committed a criminal offence in respect of the use of the terms 'trash' and 'mega-trash'. By contrast, besides maintaining the establishment of the offence of defamation, the Budapest Metropolitan Court proceeding as court of second instance in the criminal lawsuit also established that the defendant had committed the offence of libel by publishing the statements in the article (20.Bf.V.7908/2009/5.). According to the position of the court, the parts of the text pertaining to L. K. were statements of fact rather than statements of opinion and Ungváry had been unable to prove the veracity of the statements that were injurious to L. K. The third instance forum, the Budapest Court of Appeal, reversed both previous judgments and acquitted the defendant of all charges (3.Bhar.341/2009/6.). The court shared the position of the court of first instance in that Ungváry's statements made about L. K. 'should be regarded in their entirety as opinions, conclusions made in an academic study on the basis of research that are [negative to L. K.].' These opinions had 'certain factual grounds' and the author had published them in good faith. As regards the expression 'trash', the court did not deem this to be defamatory either, but only as an opinion that public figures are required to tolerate. The ruling of the Supreme Court, proceeding on the basis of the motion for judicial review, maintained the third instance decision of the Court of Appeal (Bfv.III.927/2010/4.). In keeping with the rules of criminal proceedings, the supreme judicial forum could not assess whether the previously proceeding court had considered the evidence available in an appropriate manner and had made valid inferences on the basis of it.

In summary, the final outcome of the proceedings was quite different in the civil law and the criminal law cases: in the former Ungváry had been convicted while he had been acquitted in the latter, on the basis of the very same facts.

## 38.4 THE STANDARDS APPLIED BY THE HUNGARIAN COURTS

The various civil and criminal law courts have not applied a single, uniform measure with regard to the protection of the reputation and honour of public figures and neither have they applied the measure set by CC Decision No. 36/1994. (VI. 24.) in a uniform manner.

The first civil law court decision directed at the protection of honour and reputation (Budapest Metropolitan Court, No. 19.P.25.000/2007/16.) referred to the CC decision, laid down the broad freedom of opinions and made mention of the measure applicable to statements of fact:

> According to the position of the Constitutional Court, freedom of expression does not protect the communication of false facts that are capable of defamation, if the person from whom the communication originates is aware of its falsehood or the rules of his or her trade or profession would require the examination of the truth of the facts from him or her, but he or she has failed to proceed with the due diligence required by the responsible exercise of the fundamental right of the freedom of expression.

According to the court, therefore, historians, journalists and press organs are expected to conduct a thorough examination of the veracity of the facts. Following the identification of the constitutional measures, the court regarded the majority of the statements of the article found to be injurious by the plaintiff as (false, i.e. unproven) statements of fact and imputed to the defendant the latter's non-compliance with the duty of special diligence.

Although the second civil court decision passed in the wake of the appeal (Budapest Court of Appeal, No. 2.Pf.21.082/2009/5.) did mention the CC decision, its own ruling was not based on that. In this case this neglect may be understood as a positive development from the aspect of the interpretation of the law because, in contrast with the CC decision, the judgment differentiated between expressions of opinion that have a factual basis and those that do not and, since the majority of Ungváry's statements were regarded as opinions grounded in actual fact, the court only established a legal violation on the basis of the publication of the opinion containing the terms 'trash, mega-trash'.

The third civil law court decision passed in the course of the review process (Supreme Court, No. Pfv.IV.20.328/2010/5.) made no mention at all of the 1994 CC decision and did not establish a separate measure to be applied. Since the court regarded the disputed statements to be statements of fact, the truth of which had not been proven by the defendant, it established the violation of the good reputation of the plaintiff.

Although the first criminal court decision (Pest Central District Court, No. 20.B.25.036/2009/14.) made a minor reference to the 1994 CC decision, the acquittal of the defendant was not based on the principle of the full freedom of opinions and value judgments about public figures provided for therein, but rather on the protection of the freedom of academic debates and the non-restrictability of academic opinions by courts of law. The latter is an important constitutional guarantee; however, we believe that in this case the court had misunderstood the substance of the freedom of academic research. The decision provides that:

> The question of whether cooperation between the party and the organs of state security had been a necessity is an academic issue. Accordingly, it is also an academic issue whether, on the basis of the necessity of such cooperation, the

> cooperation of [L. K.] with the organs of state security may be proven on the basis of the sources available.

At this point the court had mixed the 'general' results of academic research with the results of the research related to L. K. In my view the above issue does involve a – general – question of academic research, namely whether 'cooperation between the party and the organs of state security had been a necessity.' As regards the specific role played by L. K., the veracity of statements of fact or opinions that have a factual basis about his person is something that is open to investigation during the course of a legal procedure. That is, if the courts do not find evidence of the veracity of statements of fact or factual grounds for statements of opinion, only the CC's measure of due professional care could provide relief from legal responsibility (in the event of false statements of fact). The assessment of the academic presentation of historical events and processes (eg the operation of the communist secret services) and the statements published about the specific actions of specific persons may be different. If this were not so, if the freedom of academic research were to provide protection to any analyses of the events of recent history, down to the level of the presentation of the actions of individuals, participants in the events of history could easily be deprived of the protection of their personality rights, i.e. any false statement or groundless opinion could be published about them, and this would serve neither the ethics of academia nor of history nor the stability of the system of the protection of personality rights (in agreement with this decision see No. ÍH 2013. 59). The Supreme Court's statement was in agreement with this; the ruling on the closure of the criminal proceedings (Bfv.III.927/2010/4.) declared that:

> In the given case – obviously – it may be a question of academic truth whether the former position of the substitute private prosecutor, the related tasks and their performance correspond to or constitute the actions referred to in the statements found by him to be injurious. The establishment of … whether he had specifically and actually engaged in such activities – i.e. his actual, specific conduct – may form the subject of an evidential process in a lawsuit. If the specific conduct of a specific person were regarded as an academic truth, this could result in the removal of such conduct from the realm of the law; the establishment of its veracity (actual fact) would become the privilege of the academician(s), independently even from the person concerned.

Strict insistence on the veracity of the facts could perhaps be loosened if the courts were to apply the CC's measure of due care in their actual practice; in this case, errors committed in good faith would be exonerated from legal liability.

The second criminal court decision (Budapest Metropolitan Court, No. 20.Bf.V.7908/2009/5.) made no mention of the 1994 CC measure either, it regarded most of the injurious communications as statements of fact and – on the basis of the 'traditional' interpretation of the law – established the commission of the offences of libel and defamation due to the absence of evidence.

The basis for the third criminal court decision (Budapest Court of Appeal, No. 3.Bhar.341/2009/6.) appears to be CC Decision No. 36/1994. (VI. 24.), referred to in the decision several times; however, in actual fact the court applied a measure different from the one provided for therein. The Court of Appeal correctly quotes the CC's decision, according to which the 'expression of a value judgement capable of offending the honour of an authority, an official or a politician in the public eye, and expressed with regard to his or her public capacity is not punishable under the Constitution.' Following this, however, the court declared that 'the freedom of expression means that the majority is required to tolerate even extremely offensive expressions that are not devoid of factual bases and thus do not qualify as abusive, if they take the form of value judgements.' That is, in contrast with the CC, the Court of Appeal differentiated between opinions with factual grounds and opinions devoid of such grounds; something that is not objectionable, as shown by our previous argument. Unfortunately, however, following this the Court declared that 'in the case of public figures, proof does not serve the discovery of the facts, but only to prove that the perpetrator had proceeded in good faith, i.e. to prove whether the value judgment had factual grounds or not.' This renders almost nonsensical the previous differentiation between opinions, as it does not require, in the case of opinions with factual basis, that the communicator of the opinion be able to prove the veracity of such factual grounds; rather, it is content with the mere existence of such (true of false) factual grounds. As a result of this, the communicator of an opinion based on false factual grounds would be exculpated from legal liability, even if he or she had neglected to take professional care, and in most cases this would be contrary to the requirement of good faith also mentioned as part of the court's measure. Naturally, opinions with false factual grounds may not necessarily be restricted in every case and value judgments may be provided protection on the basis of other considerations if they are on important public issues and the context and manner of the communication (its proportionate and non-denigrating nature), or perhaps an unprejudiced account of a dispute, call for such protection.

## 38.5 THE CRUCIAL DISTINCTION BETWEEN FACTS AND OPINIONS

As may be seen, to a large extent the decisions of the courts were based on whether they regarded the elements of Krisztián Ungváry's publication found grievous by L. K. as statements of fact or statements of opinion. Of the seven different court decisions passed

on the merits of the case, the numbers of those qualifying the most important statements as statements of fact and those qualifying them as statements of opinion were nearly equal (4–3). This circumstance in itself indicates that the contents involved are very difficult to assess. In such borderline cases no clear directions exist for the courts to follow; the decision about the nature of the communication (which is a prerequisite for identifying the measure to be applied, given the differences between legal assessment of statements of fact and statements of opinion) falls under the scope of their discretion in interpreting the texts involved. In general it may be said that the decisions of the courts do not dwell upon lengthy linguistic or other analyses when examining the parts found to be injurious. Table 38.1 presents an overview of the decisions of the courts with regard to five prominent sections of the text.

**Table 38.1 Distinction between statements of fact and opinion in the Hungarian court decisions passed in the *Ungváry* case (not including the decision in the press correction case)**

| 1. Civil court decision (Budapest Metropolitan Court) | 2. Civil court decision (Budapest Court of Appeal) | 3. Civil court decision (Supreme Court) | 1. Criminal court decision (Pest Central District Court) | 2. Criminal court decision (Budapest Metropolitan Court) | 3. Criminal court decision (Budapest Court of Appeal) |
|---|---|---|---|---|---|
| *'[L. K.]'s conduct wholly qualifies as the work of an agent.'* | | | | | |
| statement of fact | Opinion | statement of fact | opinion | statement of fact | opinion |
| *'[L. K.] maintained a regular and obviously collegial relationship with the organs of state security, often pro-actively meeting their expectations.'* | | | | | |
| statement of fact | Opinion | statement of fact | opinion | statement of fact | opinion |
| *'As an official contact [L. K.] had been a diligent informant and proponent of hard-line policies.'* | | | | | |
| statement of fact | Opinion | statement of fact | opinion | statement of fact | opinion |
| *'[L. K.] reported to state security in the line of his professional duties.'* | | | | | |
| statement of fact | Opinion | statement of fact | opinion | statement of fact | opinion |
| *'The action of [L. K.] against S. Zs., an alleged sympathiser with the Dialogue group, resulted in the political demise of the latter.'* | | | | | |
| statement of fact | Opinion | statement of fact | opinion | statement of fact | opinion |

With so many different judicial opinions, it is hard to take a clear stand in respect of the texts. For example, the statement according to which 'the conduct of [L. K.] wholly qualifies as the work of an agent]' could rightfully be regarded as a piece of opinion, since Ungváry

did not state that L. K. had been an agent, but only that he performed work similar to that of an agent. It is more or less known what an agent did under communism and its assessment is an issue of academic research worthy of higher protection; if a historian states that someone's conduct had been similar to that of an agent (that the person qualified as an 'official contact'),[12] this may be regarded as an opinion with factual basis, the factual grounds of which (ie the similarity of the work of an agent to the conduct of the 'non-agent') may be subjected to proof. Irrespective of this, however, the results of the courts' assessments of this section, too, yielded widely different results.

The regular, collegial relationship with state security is probably a statement of fact that requires proof; however, the second part of the sentence ('often proactively meeting their expectations') could be regarded as an opinion with sufficient factual basis, since academic methods are available to determine what these expectations consisted of, therefore an opinion grounded in fact is possible about whether L. K. had been proactive in meeting such expectations or not. It is questionable whether the use of the term 'informant' is a statement of fact or, rather, an emotional qualification of the 'information reports' indisputably co-authored by L. K., in which case it would be more of an opinion. In our view the expression 'had been a proponent of hard-line policies' is more of a statement of fact than a statement of opinion and may be subjected to proof.

Even more problematic is the assessment of the sentence according to which '[L. K.] reported to state security in the course of his professional duties'. In the lawsuit with respect to this sentence, Ungváry referred to the fact that the official 'textbook'[13] published by the Ministry of Internal Affairs itself stated that senior party members were required to cooperate with the state security organs, and it had been clearly demonstrated in other cases, too, that there had been constant rapport between the party organs and the organs of state security; these were not distinct from each other. The question is whether, given this general information, the assumption that L. K. specifically had personally cooperated with the organs of state security is a statement with factual basis, especially since the cooperation assumed by the historian had no written evidence available as proof in a subsequent legal process. At this point, a question belonging to the realm of the theory of learning also arises, namely whether there is a difference between 'historical' and 'legal'

12 Ungváry based his statements – e.g. that L. K. had been an 'official contact' who performed similar work to that of the agents of the secret police and that he 'reported to state security in the course of his duties' – on the definitions of the so-called 'State Security Textbook' published by the Ministry of Internal Affairs (*The operative forces, assets and applicable methods available to state security work, the organisation of the network.* Publishing House of the Ministry of Internal Affairs, undated), according to which 'the term official contact denotes persons who, due to their senior position in the given field, line or object, are mandatorily required to assist the work of the state security organs.... Thus, official contacts are persons who hold certain offices or functions ... [e.g.] the leaders of party and mass organisations' (ibid. 9), the confidential so-called 'Information reports' co-authored by L. K. with monthly regularity and the minutes of the Executive Committee of the University's party organisation.

13 See the previous note.

truth, i.e. is it possible that historians widely accept a statement, the truth of which cannot proven during the course of a legal procedure. In a later article commenting on the condemnatory judgment of the civil court against him, Ungváry himself criticised this different nature of 'legal' truth and the fact that the court only assessed L. K.'s conduct in the light of Ungváry's statements, but not from a moral perspective:

> According to the logic of the court, no statements may be formulated about issues in respect of which no direct and clear evidence is available. If this tenet is applied to the science of history, an absurd situation arises which destroys the possibility of academic research as well as the freedom of opinion. It is useless that evidence clearly sufficient to pass an academic (ie not legal) decision on an issue is available to the student of history if such evidence is insufficient for direct proof.[14]

The logic of the courts and lawsuits does indeed work this way: in the present case, the historian had not been able to prove distinctly the connection of L. K. with the organs of state security. Irrespective of whether the last piece of text in the table, according to which L. K. had caused the 'political demise' of a university student, qualifies as a statement of fact or an opinion with factual basis, it is, in our opinion, open to proof, or is grounded in facts open to proof, since it is clear that, prior to 1989, the student in question could hold no political office, and it is also clear that the state and party organs very carefully filtered the persons admitted among their rank and file. L. K.'s conduct – his public address against the student at the 28th March 1983 meeting of the Executive Committee of the university's party organisation – had played an instrumental role in this (the role itself is a true fact, while its weight and significance in causing the student's 'political demise' is a protected opinion).

It should be noted at this point that, besides the uncertainties in the legal application of the rules of the protection of personality, the cases under examination also highlight how fraught with difficulties enquiring into Hungary's troubled past can be. Since public figures have failed to confront their own activities during the communist era honestly, and since the public could only access fragments of this information, the results are protracted legal procedures that are never closed to the full satisfaction of either litigant, along with the clouding of historical facts. If, after 1989, everyone had owned up to their previous actions or would have been required to do so by law, much less effort would be needed

14 K Ungváry, 'Egy ítélet margójára' *Élet és Irodalom*, Vol. 54 No. 26 (2 July 2010); K Ungváry, 'Mennyiben hasonló Kiss és Biszku védekezése?' (*HVG*, 21 June 2010) http://hvg.hu/velemeny/20100621_ungvary_kiss_biszku.

from historical research to uncover the past and there would be a much narrower margin for errors or exaggerations on the side of historians.

## 38.6 THE CASE BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

Krisztián Ungváry and the publisher of *Élet és Irodalom* sought remedy from Strasbourg against the condemnatory judgment passed in the civil law suit.[15] Although the ECtHR established a violation of the applicants' freedom of speech, its judgment unfortunately does little to clarify the issues. Neither did the peculiarities of Strasbourg's decision-making mechanism contribute to a clear settlement of the case, as the ECtHR may only pass a single decision, either establishing a violation against the freedom of speech or rejecting the claim, but it may not assess the disputed parts of the text separately, i.e. it cannot rule that 'the qualification of part A) of the text as infringing violates the right of the applicant' while 'the decision of the Hungarian court in respect of part B) of the text is acceptable.' In actual fact, the decision of the Hungarian courts consisted of several smaller decisions about the various individual parts of Ungváry's publication under examination; however, Strasbourg is only able to pass a single, unified decision about the whole of the Hungarian judgment. Consequently, the ECtHR did not even attempt to analyse the various parts of the text individually, but attempted to assess the article and the decision of the Hungarian courts in general.

The decision – as is customary for the decisions of the ECtHR – recalls the dogmas on the protection of the reputation and honour of public figures (higher threshold of tolerance, the importance of the openness of public debates, the watchdog role of the press in a democracy). In themselves, however, these are not sufficient to decide the case. An important element of the judgment is that, using a general formulation, the ECtHR 'does not dispute' the decision of the Hungarian courts (or, more exactly, of the Supreme Court's final decision in the case), according to which the disputed statements were statements of fact.[16] Although true, at a later point the judgment creates a sense of uncertainty in the

15 *Ungváry and Irodalom Kft. v. Hungary* (Appl. No. 64520/10, judgment of 3 December 2013).

16 Ibid., para. [52]. The formulation used by the ECtHR at this point is ambiguous. The term 'does not dispute' does not necessarily mean that the body was in agreement with the Hungarian court regarding the assessment of this issue. The Danish case referred to by the ECtHR (*Pedersen and Baadsgaard v. Denmark*, Appl. No. 49017/99. decision of 17 December 2004 [major Chamber], [76] and the Austrian case cited in the Danish case (*Präger and Oberschlick v. Austria*, Appl. No. 15974/90. judgment of 26 April 1995) leaves the decision of whether a disputed communication constitutes a statement of fact or a statement of opinion to the discretion of the courts of the Member States, applying the principle of the *margin of appreciation* (applied in the case law of the ECtHR for the first time in the judgment of 7 December 1976 in Case 5493/72. *Handyside v. the United Kingdom*: for further details see A Legg, *The Margin of Appreciation in International Human Rights Law. Deference and Proportionality* (OUP 2012). At the same time, the Second Section passing the decision in the *Ungváry* case was not always consistent in the application of this principle, as is shown by the above discussed *Karsai v. Hungary* case, where the ECtHR overrode the consideration of the state court.

reader by nevertheless disputing the position of the Hungarian courts, where it expounds that the restrictive interpretation of certain expressions used in the article had presented the Hungarian court as regarding them as opinions.[17] Elsewhere, the decision declares that 'official contacts' did enjoy a certain degree of leeway in the course of their cooperation with the organs of state security; therefore L. K.'s over-performance of their expectations constitutes a 'fact-related value judgment'.[18] At yet another point, the judgment writes that the article had been, 'to some extent', based on statements of fact.[19] Instead of such contradictory statements, the ECtHR should have clarified its qualification of the various parts of the article, and this is what the outcome of the case should have been based on.

The decision of the ECtHR states that certain statements of the applicant (the 'regular and obviously collegial relationship with the organs of state security, often pro-actively meeting their expectations') had 'exceeded the limits of journalism, scholarship, and public debate'.[20] These assumptions had been libellous and had no sufficient factual basis.

On the basis of this (ie if the ECtHR regarded the publication as consisting of statements of fact without proof, i.e. statements that do not enjoy the protection of journalistic or scholarly freedom), the application should have been rejected. However, the ECtHR attempted to present arguments proving the violation of the freedom of speech. Even in cumulative form, these arguments are hardly convincing. (Given the complexity of the assessment of the case, the arguments may be sufficient to assist the Second Section of the ECtHR to reach an acceptable decision in the specific case, they are certainly not sufficient to set up a general norm for the assessment of cases of defamation against public figures.)

This first such argument is that the court should have interpreted the disputed passages of the text in conjunction with the entire article.[21] The ECtHR records that the author's intention with the article was to prove that 'official contacts' had collaborated with the organs of state security without being expressly ordered to do so. The Hungarian court attached no significance to the argument that L. K.'s reports had been available to the authorities of the communist system, too, and that the applicant's 'undeniably offensive and exaggerated' statements were made within the broader context of presenting the operation of the oppressive mechanism of the totalitarian system.[22] At the same time, if the purpose, content and general grounds of a text and the relationship of the offensive passages with the whole were, in themselves, regarded as grounds for exculpation from legal liability, this would result in significant uncertainty regarding the assessment of the relationship between the protection of reputation and the freedom of speech. Within the

17 *Ungváry and Irodalom Kft. v. Hungary* (Appl. No. 64520/10, judgment of 3 December 2013), para. [59].
18 Ibid., para. [58].
19 Ibid., para. [73].
20 Ibid., para. [53].
21 Ibid., para. [54].
22 Ibid., para. [55].

context of the protection of personality rights, it is necessary to focus on the offensive parts of a longer piece of text, while the other parts are most often only relevant if they have a bearing on the interpretation of the offensive parts; in the present case, the ECtHR accepted the falsehood and offensive nature of the parts highlighted by L. K. even in the light of the full article and so this reasoning does not appear to be convincing. The 'contextual analysis' of the offensive parts of the text can only act as an auxiliary principle in the examination of a violation against the freedom of speech. In the given case a decision was required about an extremely complicated and hard to assess text; the involvement of this principle in the decision was acceptable, although not fully convincing and devoid of any general effect that is applicable in other cases.

Following this the ECtHR stated that the accuracy expected of a journalist or a historian is not measurable in the same way as the accuracy expected from a criminal court, i.e. a lower (less strict) measure of proof is sufficient in the event of the participation of the former in public debates than that with regard to the courts.[23] This may recall the measure of professional diligence provided for in CC Decision No. 36/1994 (VI. 24.), but only as a rather remote memory, since the ECtHR made no mention as to just what the measure of proof consists of with regard to journalists and historians. Lacking this, however, the ECtHR nevertheless established that the Supreme Court had failed to take the importance of the role of the press in society into consideration in respect of the given case and did not apply 'most careful scrutiny' in its decision on the limitation of the freedom of press.[24]

By contrast, another statement of the ECtHR was apposite, according to which the Hungarian court did not examine the issue of the extent to which holding party positions and reporting to the organs of the party may be regarded as activities performed (in part) for the organs of state security, given the close interrelationship between the various organs.[25] (We have also reflected on this deficiency when analysing the Hungarian decisions. If a specific answer had been provided to this question then that would have affected the legal assessment of several statements in the article.)

The remaining arguments of the ECtHR contain no new elements; the decision records that the issue under dispute is an important topic of public life and that the applicant had accessed the documents forming the basis of the article in the course of academic research.[26] The ECtHR does not regard making decisions on historical issues to be its task either, but stresses that such publications are worthy of the heightened protection extended to political debates.[27] The disputed content had bearings on L. K.'s public activities and not his private

23 Ibid., para. [56].
24 Ibid., para. [57].
25 Ibid., para. [60].
26 Ibid., para. [61].
27 Ibid., para. [63].

life.[28] The article represented an academic position, albeit using exaggerated language, but without sensationalism.[29] The ECtHR also argued that, at L. K.'s request, the paper published by the second applicant had published a rectification (which could, ironically, serve as an argument in proof of an actual violation of personality rights). It is surprising that, according to the position of the ECtHR, L. K. suffered no negative consequences in respect of his professional activities as a result of the publication of the article (surprising because the ECtHR thereby overrode the opposite finding of the Hungarian court without offering any substantial proof; the extent of the negative consequences suffered by L. K. due to the publication is, of course, debatable, but the fact that it is primarily the national court that is competent in assessing this is beyond dispute).

In summary, it should be stressed that the ECtHR took a questionable direction when it established a violation against the freedom of speech on the basis of uncertain arguments. On the basis of these arguments, in cases that are much less complex and difficult, parties communicating statements of facts that are clearly false could also cite a violation of Article 10; however, the special features of the *Ungváry* case and the complexity of the text under examination will hardly make it capable of becoming an often cited decision of precedent value. The ECtHR could have achieved the same result via different means, whether by regarding the disputed sections of the text as opinions that have a factual basis, or by an application similar to that of the Hungarian CC in respect of statements of fact or by establishing that the sanction applied had been excessive. After considering the various elements of the text individually, the ECtHR could have declared that, since it had only agreed with a part of the Hungarian court's consideration of the case (eg it only regarded 4 of the 10 disputed sections to be false statements of fact), the decision of the Supreme Court had thus violated the freedom of speech since, besides the rightfully restricted communications, it had also extended over protected statements.

In respect of the publisher of the newspaper as secondary applicant, the ECtHR had also established a violation against Article 10, but on the basis of much more plausible arguments. (The Hungarian courts established the uniform legal liability of the author and the publisher, although the measure of due professional care may be entirely different with regard to each: the task of the historian is to uncover the truth via the methods of academic research, while the publisher of a newspaper can hardly be expected to call into doubt the content of an article based on the findings of a recognised historian.) According to the decision, the extent to which the publisher had been compelled to regard the article as written by a reputable historian had been a substantial factor, as had been the issue of whether the examination of the truth of such an article could legitimately be omitted by

28 Ibid., para. [64].
29 Ibid., para. [67].

the newspaper.[30] In order to be able to fulfil the role of 'watchdog', it is important that the level of the legal liability of the publisher should not be so high as to encourage self-censorship.[31] Also significant is the circumstance that the state security documents on which the article were based are not public and their analysis requires special knowledge, i.e. the publisher would have had no possibility to verify the article and had no reason to doubt its accuracy as it had been written by a well-known expert in the subject. The publisher had adhered to the rules of journalistic ethics and the publication had not been in bad faith.[32]

An important and noteworthy circumstance is the fact that two justices had attached dissenting opinions to the decision (or, more precisely, a detailed opinion was written by Egidijus Küris J, while two others subscribed to and expressed their agreement with that opinion), i.e. in the seven-member section the decision was passed by a minimal majority. The dissenting opinion adopted the position of the Supreme Court in all significant issues, with the exception that Küris J and the other two judges also agreed that, in respect of the article published, Article 10 had been violated, as the publisher had proceeded with a 'proper standard of care' (Opinion of Küris J, Para. 1). Küris J declared that the case was a 'borderline case' where no clear precedent was available.[33] According to the three judges formulating the minority opinion the published statements had been statements of fact; however – by contrast with the majority opinion – their truth should have been proven by the applicant in the article. The publications had clearly violated L. K.'s personality rights.[34] Another interesting point raised by Küris J was that, at the time of the publication of the article, L. K. had been a CC judge (and still is at the time of the present study) and had been awaiting re-election (and not in vain, as we have seen). In the case-law of the ECtHR related to personality rights it is an important consideration that society has placed trust in the courts, attorney's offices, judges and attorneys, i.e. in their case the protection of their reputation and honour is restricted to a lesser degree than with regard to other public figures (politicians, government officials).[35] To the regret of Küris J and the other two judges, the majority of the judges of the ECtHR did not consider the question of loss of public trust in L. K.[36]

30 Ibid., para. [73].
31 Ibid., para. [74].
32 Ibid., para. [75].
33 *Ungváry and Irodalom Kft. v. Hungary* (Appl. No. 64520/10, judgment of 3 December 2013), Küris J, dissenting opinion [4].
34 Ibid., para. [17].
35 See e.g. *Barfod v. Denmark* (Appl. No. 13/1987/136/190, judgment of 28 January 1989); *De Haes and Gijsels v. Belgium* (Appl. No. 7/1996/626/809. judgment of 27 January 1997); *Skalka v. Poland* (Appl. No. 43425/98. judgment of 27 May 2003); *Perna v. Italy* (Appl. No. 48898/99. judgment of 6 May 2003); *Lesnik v. Slovakia* (Appl. No. 35640/97. judgment of 1 March 2003).
36 *Ungváry*, Küris J, dissenting opinion, para. [18].