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**“... without uncertainty, compromise and fear,”¹ or
Should the New York Times Rule Be Introduced in Hungary?**

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Introduction: The Right to Ridicule

In the former Soviet Bloc, one of the countries that has succeeded the most in transforming itself is Hungary. Since the first free election, in 1990, each successive administration served a full four-year term. Hungary leads in the amount of foreign investments; having become a member of NATO, Hungary is also likely to become a member of the European Union.

However, that transition has not been without difficulties. Fundamental liberties, such as freedom of speech, are valued less today, eleven years after the fall of the Berlin Wall, than in the first years of the new democracy. Such a contradiction is characteristic of the ongoing transformation in Hungarian society. An emerging democracy needs a vigilant free press to strengthen its citizens' confidence in its institutions by making them transparent² and accountable. But, as it will be shown, when freedom of the press is being seriously threatened, little effort is exerted to save it. In that respect, the speech-related decisions of the Hungarian Republic's Constitutional Law Court ("CLC")³ have had a profound impact. It goes beyond the boundaries of this article to discuss in merit the decline in free-speech protection prevalent in CLC's decisions brought in the course of the transition period between the romanticized Velvet Revolution in the early nineties and today's disillusionment, a reaction to the unexpected difficulties of change.⁴

This article compares the 1994 CLC decision regarding defamation suits against public officials and public figures, with the New York Times rule⁵ as well as the practice of the European Court of Human Rights ("Eur. Ct. H.R."). Freedom of speech carries particular importance for new democracies such as Hungary. Without public criticism and without open debates, such democracies cannot grow. It is necessary to create a constitutional environment that welcomes and encourages the right to ridicule public officials, elected and appointed alike. The cases of public figures and the legal distinction of their various categories go beyond the limits of the present article.

The right to ridicule public officials develops in a culture of self-limitation. The term "self-limitation" refers to the conduct of people who wield political, economic, social or other kinds of power, who influence the legal framework of public discourse — a good example of which is regulating libel actions against public officials and public figures — who, notwithstanding, can accept the necessity of limiting their authority in order to enhance open democratic debates. Part 1 of this article will examine the general difficulties of self-limitation without which constitutional norms, such as the New York Times rule, cannot be created nor maintained. The overall object of this study is to show how Hungary deals with these difficulties and what would be the best way to

arrive at such self-limitation in its second decade of democracy. The Hungarian solution may be of interest for not only post-dictatorial but also all democracies.

Part 2 will summarize CLC's supposedly most important free-expression rulings aside from the 1994 decision, followed by an in-depth analysis of the 1994 decision itself in light of the issue of censorship/self-censorship recently debated in Hungary. The comparison of the 1994 CLC ruling with the New York Times rule and the protocol of Eur. Ct. H.R. will indicate which elements of the New York Times rule could be found particularly speech-protective. Constitutional literature⁶ examines the American influence on new democracies; here Hungary is an example of how far it follows the American model in the field of freedom of expression. After a review of arguments against the adaptation of the New York Times rule in Hungary, a conclusion will be reached. Despite cultural differences, the New York Times rule is a most helpful measure for a democracy, especially in emerging democratic systems.

1. The Difficulties in the Self-Limitation of the "Crazy Monkey"⁷

It is precisely the allowance of robust public discourse that requires self-limitation from those very powerful persons and groups who are the targets of sometimes rude attacks, provided that the rule of the game is that public officials have to put up with far more criticism than ordinary citizens. Considering how difficult it is to admit one's own errors, especially if one is harshly criticized, one seems to be convinced that one's sacred goals are inherently right and faultless, therefore criticism should be suppressed. The importance of self-limitation may be taken for granted in the constitutional argument in the United States, but in a new democracy such as Hungary, it is an unmined field of studies.

The precondition of introducing self-limiting regulation is to recognize that self-limitation is a fundamental necessity. Does this step require special historical moments such as the foundation of the United States or the post-communist transition in Hungary?⁸ Probably so. As Lawrence Lessig writes about the substantive and the structural limits on the government's power in the American Constitution ". . . structure builds substance."⁹ Indeed, in both the American and the Hungarian context, a judicial review set up a press-supportive libel law. In the above historical moments, the fundamental principle of free speech¹⁰ and the foundation of the divisions of power were laid down. Then the respective structures worked out the speech-protective interpretation of that principle. Self-limitation is necessary but without the help of outside structural restrictions, self-limitation alone is not sufficient. Like Odysseus when he heard the song of the sirens, we cannot really limit ourselves, but we must create a structure to limit each other.¹¹

The framers of the American Constitution were motivated by the warnings of the unsavory experiences of some European countries where, for example, a state suppressed a particular religion in the name of another, and wrongly so. The American founding fathers were aware of the drawbacks of leaving too much power in one hand. Interestingly, after 1988, during the democratic transition the new political parties in Hungary, rejecting the previous totalitarian governments and building on the experience of democracies, on democratic transitions, and on the liberal political philosophy, part of which the writers of the American Constitution could already familiarize themselves with, were similarly suspicious of concentrating state power.

The Hungarian Constitution — following the pattern of the post-World War II Constitution drafted in West Germany — considers freedom of speech a basic human right, which along with other basic human rights cannot be restricted unless by the legal authority of the Hungarian Parliament, but even Parliament cannot deny the essential part of basic human rights.¹² Parliament passed separate bills, which authorized CLC and three ombudsmen to set up four different institutions,¹³ which would guarantee that the essential parts of human rights listed in the Constitution would not be restricted.

CLC is not an appellate court, it is not part of the general court system and it does not deal with particular legal cases. It has the power to review the constitutionality of all legal rules that may be challenged in court by everyone, irrespective of one's citizenship.¹⁴ Parts 2 and 3 of this article will show the important role CLC played in creating relatively speech-protective constitutional standards in the fields of hate speech, media regulation and libel law in Hungary.

One of the ombudsmen guarantees human rights in general,¹⁵ the other two protect the rights of national and ethnic minorities,¹⁶ ensure the freedom of information and the protection of privacy.¹⁷ The ombudsmen do not have executive power. Typically, they use the venue of public argument in order to achieve respect for human rights.

Although both the famous make-no-law rule of the American Constitution and the Hungarian approach provide ample possibilities for speech regulation, in effect, they function as a limitation on state power.¹⁸ Once such self-limitation is in place, the question arises as to how a society — and more broadly the international community — can preserve the real meaning of the rule of self-limitation.

A closer look at the wording of the First Amendment in the Constitution of the United States, "Congress shall make no law ... abridging the freedom of speech, or of the press," raises the question as to what kind of regulation can be defined as "abridging." In the case of the

Hungarian Constitution a similar question arises as to what restriction might be defined as “essential”? We cannot seem to escape the dangers of arbitrary interpretation.¹⁹ It is as if Odysseus would have had control of the ropes that kept him bound when he heard the song of the sirens.

Even if the separation of powers can help us limiting the authoritative influence on the public debate about speech law, the common understanding of the necessity of self-limitation in this field is a basic task for new democracies, such as Hungary. It is easier to meet this challenge if we do not forget about the dangers we mean for ourselves. On the level of constitutional theory, that might be taken for granted in the United States, but the examples of the post-dictatorial countries could help keep this wisdom really alive.²⁰ All the more so, because our world with its fast-developing technology and sprawling democracy around the globe may make us forget about its pitfalls.

Can the potentially suppressive forces be only others? Or, could we find ourselves in the position of the powerful? Actually, if we are aware of our human nature — which is so far from the perfection of a beautiful tree — it may come as a surprise that we are able to develop self-limiting regulation at all.

The difficulties of self-limitation may be detected in the story of the fall and rise of the licensing system during the English Revolution in the seventeenth century. The licensing system fell only to rise again. John Milton wrote his famous *Areopagitica*²¹ against censorship when “the very English people in whom he had once placed so much trust”²² reintroduced the previously abolished licensing system only some years after its abolishment because of their fear of the proliferation of publications supported the King in the war. As Vincent Blasi writes:

"Then the new technology of mass communication was the unlicensed pamphlet, printed in bulk, in the vernacular, no longer confined to abstruse theological disquisitions."²³

Once in power, the revolutionary forces were frightened by the powers of the effective new technology, forgetting that the licensing system served the power of the King, their opponent.

Examples of this can be found not only in the distant past, but in the more recent experience of the former Soviet Bloc and in other post-dictatorships.²⁴ They keep reminding us to be cautious, because we are "crazy monkeys," to quote the Nobel prize winner Hungarian scientist Albert Szentgyorgyi.²⁵

For this reason, the regulations related to one of our most basic human rights, i.e. freedom of speech, have to be seen primarily as the limitation of the very powers that can suppress or even kill us. Speaking and writing about speech regulation is a paradox, because speech law should limit the restricting power of various authorities rather than set exceptional limits on particular expressions. Before deciding how to regulate speech in order to achieve allegedly justified common goals, our legal system has to put narrow limits on the opportunities of the legislative and law enforcement institutions, which, in turn, are often sensitive to negative public criticism. This is one of the paradoxes of regulating the right to free speech. The precondition of "speech-regulation" is the appropriate restriction of the activities of authorities who can abuse their power by infringing upon the freedom of expression. In this sense, speech regulation at heart is not the regulation of speech, but the limitation of speech-regulatory powers. This paradox remains the main challenge for us even in the age of the celebrated, albeit changing Internet.²⁶

In Hungary, even if the Constitutional Law Court has an opportunity to create an interpretation of the constitutional principle of freedom of speech, which actually protects criticism of public officials thereby guaranteeing free debate of public matters, CLC does not isolate itself from the ideas shared by wide circles in Hungarian society. If the political leaders and the majority of citizens are not aware of the profound value of free speech, including the freedom to ridicule public officials, the constitutional argument is likely to mirror this defect in public morale. No matter how enlightening and educating roles CLC may play, nor how effective decisions it may pass, sometimes against the prevalent opinions in the country,²⁷ without a common understanding of the necessity of the self-limitation of power respecting freedom of speech and unrestricted public discussion, it is almost predictable that the Constitutional Law Court will not be able to protect these values. The 1994 CLC decision on the defamation of public officials was a very important step to improve Hungarian democracy, but questions remain as to how the judges will follow this ruling,²⁸ how the journalists will react,²⁹ and how far the entire society will understand and support this new rule, which was created by the judicial review.³⁰ Of course, these reactions also influence the future development of the constitutional argument on free speech itself.

In the first years of the new democracy, Hungarian society, under the influence of fresh memories of censorship, was intoxicated by free speech and CLC's related decisions expressed such public sentiments. But even then the Constitutional Law Court did not go far enough in protecting freedom of speech, and it is unlikely that such a good opportunity would reoccur in the

near future. To weigh such possibilities, the following parts will describe arguably the most important free-speech decisions of the court.

2. “... the fundamental requirement for the existence of a truly vibrant society . . .”

A review of CLC’s related decisions reveals that the Court in the years following its establishment in 1989, reflected the liberal spirit of the post-communist transition.³¹ In that period, CLC respected freedom of speech and the idea of independent public television and radio as the core values of the new democracy.

The 1992 CLC Hate-speech Decision

The first profoundly important decision was passed in 1992 about the issue of hate speech.³² Surprisingly, this judgment partially recalls the famous “clear and present danger” test of the United States Supreme Court (USSC), which was first formulated by Justice Holmes when he wrote the opinion for the Court in the Schenk case³³ and in his landmark dissent in the Abrams case.³⁴ The 1992 CLC hate-speech decision played a significant role in the Hungarian constitutional argument about freedom of speech and public debate. In this ruling, the Court struck down the second provision of Article 269 of the Criminal Code, which said that:

Anyone who in front of a large public gathering uses an offensive or denigrating expression against the Hungarian nation, any other nationality, people, religion or race, or commits other similar acts, is to be punished for the offence by imprisonment for up to one year, corrective training or a fine.³⁵

The reasoning part of the decision mirrors the political climate of a freshly post-dictatorial country, where freedom was a rare visitor in the course of the 20th century:

Historical experience shows that on every occasion when the freedom of expression was restricted, social justice and human creativity suffered and humankind’s innate ability to develop was stymied. The harmful consequences afflicted not only the lives of individuals, but also that of society at large, inflicting much suffering while leading to a dead end for human development. Free expression of ideas and beliefs, free manifestation of even unpopular or unusual ideas is the fundamental requirement for the existence of a truly vibrant society capable of development.³⁶

The quoted paragraph reflects the knowledge of a people who has first-hand experience of freedom denied. Also, the rich and beautiful language of the best parts of CLC's free-speech decisions written in the early nineties witness their writers' familiarity with the great texts of free-speech opinions of the USSC.³⁷ The reasoning of the 1992 hate-speech decision mentions the "clear and present danger" threshold. CLC did not use that famous American test consistently.³⁸ But it ruled that only the first provision of Article 269 of the Criminal Code contained a constitutional, albeit a necessary and proportionate, restriction on freedom of speech, which the court considered to be "the "mother right" of the so-called fundamental rights of communication,"³⁹ including the right to free speech, freedom of the press, freedom of information, and in a broader sense, the artistic and scientific freedoms.⁴⁰ The first provision of Article 269 says that:

A person who, in front of a large public gathering, incites hatred

- a against the Hungarian nation or any other nationality,
- b against any people, religion or race, further against certain groups among the population,

commits a criminal offence and is to be punished by imprisonment for a period of up to three years.⁴¹

The Court argued, that

. . . the recent change in the political system is inevitably accompanied by social tensions, . . . [but just because of these] . . . unique historical circumstances, . . . a distinction must be made between incitement to hate and the use of offensive or denigrating expressions. . . . Only through self-cleansing may a political culture and a soundly reflexive public opinion emerge. Thus one who uses scurrilous or derisive language stamps himself as such and in the eyes of the public he will become known as a "mudslinger." Such abusive language must be answered by criticism. The payment of a large amount of compensation may also be considered in this process. But criminal sanctions must be applied for the protection of other rights and only when unavoidably necessary, and they should not be used for shaping public opinion or the manner of political discourse. This latter option is that of a paternalistic approach.⁴²

The wording may remind the American reader of the famous concurring opinion of Justice Brandeis in the Whitney case:

Those who won our independence by revolution were not cowards. ... If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.⁴³

The quotes above seem to inspire an adage shared by both Americans and Hungarians. To exercise caution might mean braving free public debate. The question is whether the strong statements in the 1992 CLC hate-speech decision and an interpretation of the ensuing CLC opinions, which are dated from the first years of the new democracy in Hungary, will become a part of common knowledge in Hungarian society, paralleling what had happened following the Holmes and Brandeis opinions in the United States, albeit their landmark writings reflected the view of a then minority within the USSC.⁴⁴

The 1992 CLC Media Decision

In 1992, CLC passed a decision in relation to the control of the Hungarian Television (MTV) and the Hungarian Radio (MR).⁴⁵ In its reasoning part, the judgment established certain basic principles, stressing the unconstitutionality of any controlling structure that would influence the public broadcast media in favor of a political, an economic, or another interest group, including the executive as well as the legislative branches of the government.⁴⁶ However, the decision upheld an executive order from 1974,⁴⁷ the Communist period, about the executive branch's supervisory authority over MTV and MR, arguing that even an unconstitutional regulation is better than no regulation at all. In spite of the obvious contradiction between the elaborated principle and the decision about the executive order, the principle became a fundamental part of the Hungarian constitutional argument. But the court erred in creating a precedent that upheld an unconstitutional regulation. In 1999, the court — by which time it became quite another court⁴⁸ — built on this precedent in upholding the election of a Supervisory Board of MTV exclusively from nominees of the governing parties.⁴⁹ The argument for this unjustifiable decision was the same as the previously erroneous judgment in 1992, stating that even the unconstitutional supervision is better than no supervision at all.

With this judgment, the court gave free hand to the governing majority to usurp the Supervisory Boards of the public radio station, MR, and the two public television stations, MTV and the Danube Television (DTV), which served primarily the Hungarian ethnic minorities in the

neighbouring countries. The sad result was that instead of splitting the seats on the boards evenly between nominees of the governing parliamentary groups and nominees of the opposition, no member of the latter group was voted in by Parliament after the 1998 parliamentary elections. It is not hard to imagine that given these circumstances how can the public broadcast media maintain its checking function.⁵⁰ In 1995, Parliament passed the Media Bill⁵¹ which erroneously institutionalized control, albeit a multiparty control, over broadcast media in Hungary.⁵² Then a CLC decision, brought in 1999, gave constitutional approval to the executive branch of the government allowing it to have the public broadcast media represent the government's interest. The unfortunate and shameful 1999 media decision damaged Hungarian democracy. It reflected and influenced the public's waning support for the values of freedom of speech. It should also be remembered that it was the direct consequence of an erroneous judgment brought in 1992 concerning the 1974 executive order,⁵³ a relic from Communist times.

CLC's 1992 and 1999 decisions differ basically in that the latter one was born in a much less speech-protective environment than the one seven years earlier. Other decisions brought after 1997 concerning various aspects of freedom of speech — less damaging than the 1999 media ruling — showed a crisis in Hungarian society and its Constitutional Law Court's disrespect for freedom of speech, albeit this crisis is hopefully only temporary.⁵⁴

But before this dark period of the constitutional review of speech law had begun, in 1994 CLC passed its decision about the defamation of public officials and public figures, the par excellence issue of free debate of public matters. Together with the hate-speech judgment and the speech-protective principles established in the 1992 media decision, the 1994 ruling made it possible to build on the Hungarian constitutional argument, creating strong guarantees for freedom of expression.

The following analyses will test the strength of the foundations laid in the 1994 decision.

3. The Story of an Interview

The Story

In December 1999, TV2 — one of the two national commercial television stations in Hungary — filmed an exclusive interview with an imprisoned infamous criminal after having waited for a year to gain permission from the country's chief prison officer. But minutes before the interview went on air as scheduled, the prison officer withdrew his permit, providing a sad example of prior restraint, arguing that the criminal defamed public officials in the interview. As a

result, the news editors of TV2 decided to forfeit their prime-time schedule and broadcast the interview in the late edition of their news program after having re-edited the interview with the "help" of the officer.⁵⁵

Following the incident, the Transparency in Public Life Association, a liberal Hungarian media watchgroup,⁵⁶ issued a public statement,⁵⁷ recalling the landmark New York Times Co. v. Sullivan, 376 U.S. 254 (1964) decision of the USSC, stressing that TV2 not only failed to air an interview, which contained information about public officials' potential mafia connections, which would have been quite important for the public to learn about, but TV2 also missed the possibility to test how the courts might have applied the 1994 CLC decision on the defamation of public officials and public figures.

Transparency in Public Life contended that had the editors checked the statements of the interviewed criminal against the basic rules and principles of journalism, the courts could not have held them responsible for libel on the basis of the 1994 CLC decision. They could have lost the case only if information about public officials' mafia connections was untrue and if they failed to fulfill their professional responsibility by not checking the facts. Otherwise, public officials would have had a chance to clear the charges in front of the public.

But did the editors check the statements? Were they aware of the 1994 CLC decision, and if they were, did the decision encourage them sufficiently to take the risk of a libel case in court? Why did they decide not to show the original interview?

Let us suppose that the editors of the news program of TV2 —and the owners and the lawyers of the company, if they were also involved in the decision about the interview — knew the specifics of the 1994 CLC ruling about the defamation of public officials and public figures. The following part will show what were their chances in court.

Chances to Win in the Hungarian Courts

Even in the first years of the new Hungarian democracy, defamation of a public official was punishable by a stricter criminal sentence than defamation of an ordinary citizen. This obviously absurd rule did not take into account that a public official needed to accept far harsher ridicule than an ordinary citizen for purposes of open public debate, nor did it consider that a public official stood a greater chance to respond effectively to criticism as opposed to the chances of a private person. But in 1994, CLC turned the logic of this undemocratic rule, which it inherited from the communist period, upside down arguing that:

because of the high constitutional value of the freedom of expression in public matters, the protection of the honor of authorities and public officials as well as other public figures can justify less restriction on the freedom of expression than the protection of the honor of private persons.⁵⁸

The 1994 decision of the CLC abolished Article 232 of the Criminal Code about the special protection of public officials against defamatory statements.⁵⁹ CLC recalled both the practice of the European Court of Human Rights in related cases and relevant aspect of the New York Times rule. CLC argued that

the possibility of publicity criticizing the activity of bodies and persons fulfilling state and local government tasks, as well as the fact that citizens can participate in the political and social processes without uncertainty, compromise and fear is an outstanding constitutional interest.⁶⁰

CLC ruled that a person who states a defamatory fact about a public official or public figure with regard to his or her public capacity is punishable under the criminal law only if he or she

knew the essence of his or her statement to be false or did not know about its falseness because of his or her failure to pay attention or exercise caution expected of him/her pursuant to the rules applicable to his or her profession or occupation, taking into account the subject matter, the medium and the addressee of the expression in question.⁶¹

The expression of the value judgments in the same context are "not punishable under the Constitution,"⁶² according to the decision.

Lawrence Lessig's idea about the substance-building structure mentioned above is well illustrated here. CLC's constitutional review sets substantive limits when it turns around the undemocratic rule of the previous Hungarian libel law — as a similar situation occurred in the United States in the Sullivan case.

Nevertheless, the CLC decision did not provide a sufficiently strong protection for the freedom of speech that is critical about the public capacities of public officials for the following three reasons:

First, the basic problem remains that libel actions against public officials in Hungary can be litigated not only in civil court, but also in criminal court, depending on the plaintiff's preference;

Second, and perhaps of utmost importance, the CLC decision did not shift the burden of proof. It remained the “speech-chilling” burden of the very person who expressed a critical opinion to prove that his or her statements were true, which could be often very difficult. In the reasoning part of its decision, CLC stressed that putting the burden of proof on the defendants in these kinds of libel cases would threaten the constitutional right of citizens to enter freely into public debate, without fear:

permitting someone to protect himself/herself with the truth under the burden of proof means not only the prohibition of consciously false statements but it is also capable of deterring criticism on the activity of those exercising public authority.⁶³

But CLC did not strike down a related provision in the Criminal Code, because that provision was not being challenged.⁶⁴ The Criminal Code says that the courts might allow the defendant to prove the truth of his or her statement only if the courts find that to be of public interest.⁶⁵ On the other hand, in its reasoning, CLC stressed that permitting the defendant to prove the truth of his or her statement must always be deemed of public interest in a defamation case of public officials and public figures.

Third, CLC ruled that the courts decided on the measure of negligence (as described in the holding part of the CLC decision quoted above) for convicting a defendant for a defamatory statement about a public official or other public figure. Although this part of the 1994 CLC decision concerned itself only with journalists — e.g., the newscaster at TV2 — or such other speakers whose profession included shaping public opinion,⁶⁶ it might produce convictions for the smallest of negligences. Given the basic role of the press in the process of public debate, the chilling effect possibly caused by this negligence rule can restrict the free-speech rights of “non-professional” speakers as well. Nevertheless, although irrelevant in the story of TV2, it is noteworthy that the 1992 CLC decision provides more protection in this detail of the defamation law — i.e., in the libel cases of speakers who do not shape public opinion professionally — than the New York Times rule does. These “ordinary” speakers are liable for their faulty criticism of public officials and public figures only if they knowingly use false defamatory statements. But of course, this element of the regulation works together with the others.

Had decision makers at TV2 been well-versed in the legal details of these crucial elements of the 1994 CLC decision, they may have been rooted on the spot knowing that they were about to face not only a civil litigation, but also a criminal procedure and the burden of proof would rest on them, with a conviction as a possible outcome even if the involved journalists and editors were

less significantly negligent. But, had decision makers at TV2 checked the facts accurately, as they should have done, they could have certainly taken the risk of a libel suit in court, but the three aspects of CLC's related ruling mentioned above could have discouraged them to start with. Also, their decision could have been influenced by the current government's pressure on broadcast journalists as highlighted above by the story of the supervisory boards of public radio and television.⁶⁷

However, the story of TV2 suggests that regulating thus the defamation of public officials and public figures curtails professional journalists' right to exercise their freedom of speech. At the same time, the censorship/self-censorship issue at TV2 stresses the importance of journalists' attitude toward their legal environment, their knowledge about their legal possibilities and their views on the importance of regulation.

One explanation of TV2's narrative could be that laws may be written faster than adopted into practice, which varies greatly with cultural environment. Self-censorship exists everywhere,⁶⁸ but someone who did not live in a dictatorial, then in a post-dictatorial country, cannot really know how "flourishing" the lack of civic courage can be in a transitional society.⁶⁹

As for the outcome of the story of the interview at TV2, the decision makers of the television station should be encouraged to appeal to the European Court of Human Rights in Strasbourg in case they fail to win the impending libel case — civil or criminal — in the Hungarian courts. The next part explores how much could Eur. Ct. H.R. help them.

Chances to Win in Strasbourg

The relatively speech-protective decisions of international relevance⁷⁰ brought by the European Court of Human Rights prove that such practice is actually possible. The Eur. Ct. H.R. applies a "necessity test"⁷¹ to decide cases under Article 10 of the European Convention on Human Rights ("Eur. Conv. on H.R.").⁷² In the landmark Lingens case,⁷³ Mr. Lingens, an Austrian journalist, was held in criminal libel by the Austrian courts for writing his harshly critical opinion about then-Chancellor Kreisky's support of a politician, who was a former SS officer. In this case, the Eur. Ct. H.R. established the rule that politicians — regarding their public activities — must endure more criticism than ordinary citizens. Furthermore, the Court decided, that the requirement to prove the truth of value judgments infringes upon the freedom of opinion guaranteed by Article 10 of the Eur. Conv. on H. R.

Article 10 guarantees that "everyone has the right to freedom of expression."⁷⁴ According to the "necessity test" the Court makes its judgments after deciding whether the restriction on the freedom of expression in a member state of the European Council was based on one of the following:

- a rule prescribed by law,
- one of the reasons listed in paragraph (2) of Article 10, which includes "the protection of the reputation or rights of others,"⁷⁵
- "necessary in a democratic society,"⁷⁶
- proportionate with its intended purpose.

Article 19 Freedom of Expression Handbook⁷⁷ lists some of the principles established by the Eur. Ct. H.R. in its judgments in related cases. Two of the listed principles say:

(3) the limits of acceptable criticism are wider concerning governmental bodies and political figures than concerning private individuals, and in general are wider when no named individuals are specifically criticized;

(5) a defendant must not be required to prove the truth of value judgments, statements reflecting public opinion or allegations based on rumors or the statements of others;

The text of principle (5), which is summarized in the Article 19 Handbook, makes it clear that Eur. Ct. H.R.'s practice is to leave the burden of proof on the defendant for factual statements, except for statements outlined in principle (5). The foreseeable difficulties of having to prove the truth of the criticism, for example, in a case of governmental corruption, may produce a chilling effect. But, as the Castells case⁷⁸ shows, it is far from being clear whether the truth matters in libel actions against public officials and public figures. Sometimes defendants had to be content with having the chance to prove that the facts they stated were true.

In the Castells case, the court established "the principle that when a defamation is based in part on an allegation of fact, the defendant must be permitted to try to prove its truth."⁷⁹ In 1979, Senator Castells, representing a Basque separatist coalition, in a written article, accused the Spanish government of intentionally failing to investigate the murders of Basque people who were treated as separatists. The Eur. Ct. H.R. decided that the Spanish courts violated Article 10 of the Convention, because they failed to permit Senator Castells to prove that his statements were true.

Since Eur. Ct. H.R.'s protocol regarding the burden of proof in defamation cases of public officials is similar to CLC's point, TV2's only hope remains that the justices in Strasbourg would be more sensitive to the value of freedom of speech than the Hungarian judges.

As a last step in the analysis of TV2's story, following is an answer to the hypothetical question: What difference would it make if TV2 could apply the New York Times rule?

Could the New York Times Rule Help?

The New York Times rule was set up in the Sullivan case in 1964. Significantly, this case was embedded in the civil rights movement. It was about an advertisement published in the New York Times in 1960.⁸⁰ The advertisement — signed by a group of well-known public figures — protested the assaults against Martin Luther King, Jr. and others during the civil rights movement in Montgomery, Alabama. Sullivan, a public officer in Alabama sued the New York Times Co. for allegedly defamatory statements in the advertisement. In the Alabama courts the Times Co. was held for libel to pay a huge amount of money for Sullivan — libel cases were matters of civil litigation even before the Sullivan case. Similar libel judgments were pending in other Southern courts against the New York Times Co. Some of the statements in the advertisement were indeed incorrect, but the USSC ruled for the New York Times Co., thus establishing the famous New York Times rule.

The Supreme Court of the United States ruled in the Sullivan case that:

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.⁸¹

Note that this decision is more than the "actual malice"-test, which speaks about "reckless disregard," not only about negligence as the 1994 CLC decision does, regarding speakers who shape public opinion as part of their profession. Also, the New York Times rule shifts the burden of proof onto the plaintiff, which had previously been on the defendant.⁸² Shifting the burden of proof from the defendant to the plaintiff has had great significance, because if the speaker of an allegedly defamatory criticism of a public official or public figure has to prove that his or her statement is true that can chill public debate by fear of hardly avoidable punishment.

These elements in the New York Times rule would have provided a far greater chance for TV2 to win a possible defamation case. A comparison with the CLC decision shows that it would have required more than negligence for holding any defendant responsible for libel, it would have firmly placed the burden of proof on the plaintiff(s), and it had to be a civil case, it could not have been a criminal one.

By extension, the question arises: If the New York Times rule could help the Hungarian press and other speakers — or the media and the people of different democracies — why is this rule considered a specific American phenomenon? Why are Eur. Ct. H.R. and CLC unable to develop this test? The final part of this study addresses this question.

4. A Specific American Rule or a Needed Tool of Democracy?

The issues of hate-speech and media regulation play out quite differently in Europe and in the United States. Given that Europe has its modern history of racist mass-murders, it is usually taken for granted that Europe has its reasons to be restrictive in hate-speech regulation. Although in the United States discrimination against African-Americans was still an institutional practice decades after the Holocaust, the United States takes the risk and allows hostile speakers on the marketplace of ideas instead of using protective bans for the sensitivity of the victims targeted by hatred expressions.⁸³ The limited similarities between the American and the Hungarian constitutional argument about hate speech may be surprising.

European media regulation is known to differ from its American counterpart, in spite of similarities, such as protecting children against violence and pornography in programming. While the now competitive broadcasting scene was a state monopoly for a long period in Europe, the broadcast media in the United States was market oriented from the beginning.⁸⁴

But, as to the defamation of public officials on the level of general argument, USSC and Eur. Ct. H.R. both consider the freedom to critique public officials a basic requirement in a democratic society. Both in Washington and in Strasbourg, Justices recognize the open debate of public matters as a basic need of democracy, which gives more weight to the free speech interest in the case of the defamation of public officials than for the counter-balancing interest, the protection of the reputation of the ridiculed person. In this issue, it is possible to justify the broad measure of freedom of speech with the need of the robust public discussion in a democratic society. This justification of the right to criticize the representatives of states without fear might be the best example of the instrumental justification of the freedom of expression. The

instrumental approach justifies the freedom of speech being the precondition of free public discourse, a necessary element of a working democracy.

An individual, or a country, does not need to be a true believer in the individual's right to free expression — which is the simple constitutive justification of the freedom of expression — to support the freedom of political speech as an instrument of democracy.

At the same time the instrumental justification makes it more difficult, if not impossible, to protect the freedom of different forms of expression, which cannot be connected easily to the functioning of democracy and therefore judged as non-political speeches.⁸⁵ Ronald Dworkin, while emphasizing its value, criticized the New York Times Co. v. Sullivan decision for this reason.⁸⁶

But, as we have seen, even this less speech-protective instrumental justification seems to be unacceptable or unconvincing for both Eur. Ct. H.R. and CLC to provide the same protection for the criticism of public officials as the New York Times rule does, albeit being disputably a good model.

Indeed, if we ask whether the New York Times rule is the perfect legal measure for the defamation of public officials and public figures, we might say no. Under this test many journalists can work less responsibly than it would be desired. But if we ask, whether we can find a better legal standard to guarantee the robust public debate, which is necessary for a working democracy — and to improve the freedom of expression as an individual's right, an additional purpose for the supporters of the constitutive justification of free speech, such as myself — we cannot say yes. All other alternatives have a much higher price than the one we have to pay for the New York Times rule.

We do not have ideal choices. A libel regulation, less speech-protective than the New York Times rule, might help lead to less gossipy journalism (although I doubt such an impact), but not only the freedom of speech but also the work of democracy would be restricted by such a standard. However, rationales abound against other countries adopting the New York Times rule.

The following parts will address shortly arguments about the necessary protection of personal reputation, about the significance of cultural differences and about the special situation in the new democracies.

Finally, I will propose that Hungary adopt the New York Times rule.

The Protection of the Personal Reputation

First of all, there is the argument that the New York Times rule went too far, practically reaching an almost "anything can go" situation, meaning that in fact a plaintiff can very rarely recover damages under this test. It might be true that under the responsibility of CLC's negligence rule the press publishes less defamatory statements that might be destructive to one's personal reputation. But the question is: Whose reputation in what extent is at stake and what is the counter-balancing interest?

The essential point of the New York Times rule and the similar reasoning of the Eur. Ct. H.R. decisions is the distinction between the reputation of ordinary citizens and the reputation of public officials and public figures regarding their conduct related to public matters. The pivotal question in this issue is not about the balance between personal reputation and freedom of speech. The question in unrestricted public debate is about the balance between the reputation of public officials and public figures and the freedom of expression to the extent of their public capacity.

In the case of public officials — and in the case of at least some public figures — the targets of critical statements make their own choices when they step on the stage of public debate. They know — or they should know — that they have to face harsh and unjust ridicule whatever they do. They accept this situation when they take a public role. They accept that they have a less private private-life. That is the price of being a star, a well-known figure, a celebrity, so to speak.

At the same time public officials have greater access to the different media outlets than others. For them, participating in a television or radio program, or being written up in a newspaper is not a very special moment in life, but a regular part of their work. If they are derided, they have a much better chance to answer than ordinary citizens have, even if the Internet gives more speech opportunities for the latter ones as well.⁸⁷

On the other hand, the instrumental justification of the freedom of speech in this issue is quite convincing: Without fearless criticism of public officials there is no real public discourse and real democracy cannot function. The right to ridicule the representatives of states has to be guaranteed, because to the extent of their public capacities, their right to protect their reputation is overridden by the need for robust debate about their public activities.

Other Cultures and the New York Times Rule

Another argument is a kind of mystical approach to the special characteristics of cultural differences. This never clearly argued point is about the other, especially non-Western cultures, which allegedly cannot adopt the specific American model of libel law.

It is undoubtedly true that there are cultures where at least the existing enforced rule is the invulnerable authority of, for example, the president of the country.⁸⁸ We really have to deepen our understanding of other cultures.⁸⁹ If globalization is economy driven, we have to create many programs to improve radically the real conversation between very different civilizations based on the respect of the characteristics of others. Nevertheless, we should avoid the sometimes seeming or, indeed, fashionable cultural relativism.

The defamation laws are characteristic elements of the political structures in every culture from liberal democracies, through not liberal, or only formally democratic systems, until places where if there is law followed by the authorities at all, it is rather an excuse for arbitrary, suppressive decisions. Indeed, we might ask: Where does democracy start regarding the regulation of the criticism of public officials? From which point can we call a country democratic? Is the right to fearlessly ridicule public officials a necessary element of a system for calling itself democratic? The answer is definitely yes, because, as I have already argued, without this right we cannot talk about a real public discourse, which is the basis for a working democracy.⁹⁰

Countries, such as Hungary, which follow the idea of democracy, not only use it as a well-sounding label, have to accept the right of their citizens to participate in an uninhibited public discourse without fear of punishment. A democratic political system cannot justify its legitimacy without guaranteeing its citizens the right to freely discuss the performance of public officials and other public matters — including whether the citizens agree or disagree with the majority decisions necessary in a democracy.⁹¹

The “Unprepared” New Democracies

A third argument against adopting the New York Times rule model for libel law in new democracies, such as Hungary is that these countries are not prepared for it. This is not less obscure than the point about the other cultures.

Corruption is much more dangerous for the new democracies than heated public debates. Not the free, unrestricted discussion of public matters, but the chilling effect of not enough speech- protective regulation will undermine the hardly gained freedom and the institutions of

new democracies. Not the unavoidably often false charges against public officials, but the corruption of nontransparent public offices will steal the belief of the citizens in the democratic order.

Emerging democratic systems have simply more to talk about, given the long-lasting suppression of public discourse in their societies. Instead of only moderated freedom of speech for the "unprepared" people of the new democracies, more speech is better. After long-existing suppressive periods, countries, such as Hungary, need a lot of opportunities for the free exchange of information and ideas, as someone needs to talk after a long, involuntary silence.

In the new democracies the inexperience of the free press does not justify the cautious provision of freedom of speech either. Journalists and other citizens in these countries — who are not supposed to be able to act responsibly enough, according to the "unprepared" democracy argument — have to be treated as fully capable participants of the democratic system, otherwise they will never have the experience of a working democratic system, thus they will never experience participating in a democracy.

It is also noteworthy that the press in experienced democracies do not always act so responsibly either. Telling examples are the tragic story of Princess Diana in Great Britain, or the Lewinsky case in the United States.⁹²

In fact, the new democracies need the freedom of public discourse and its constitutional guarantees at least as much as the more experienced democratic countries do. A libel law that is less speech-protective than the New York Times rule might be less damaging for the longer standing democracies of Western Europe, but for the former Soviet Bloc countries, whether or not they are under the authority of the Eur. Ct. H.R., the chilling effect of an even relatively restrictive libel regulation could mean serious threat for the freedom of speech.⁹³ Of course, it can be considered a natural difficulty in the transition from dictatorship to democracy, but the question arises whether Eur. Ct. H.R. went far enough to protect the freedom of speech in the emerging democracies.

The New York Times Rule in Hungary

Taking the Hungarian example, how can journalists serve the public debate "without uncertainty, compromise and fear"⁹⁴ if their simple negligence is enough to face criminal convictions under the burden of proof as it is the current situation in Hungary, which is under the authority of the Eur. Ct. H.R.? How can other speakers — who do not shape the public opinion

as a part of their job, and for this reason, according to the 1994 CLC decision are punishable for their false defamatory statements about public officials and public figures only if they knew that their allegations were false — participate in the public discourse facing criminal convictions under the burden of proof?

Take the example of the Hungarian television station, TV2. The decision makers did not take the risk of a criminal prosecution perhaps also because of the chilling effect of taking the burden of proof on the defendants of criminal libel cases under the simple negligence standard for journalists (and for other “professional speakers”) even if the allegedly defamed person is a high-ranking public official. TV2’s story described above shows that even the relatively speech-protective defamation law of Hungary, without the particular speech-protective elements of the New York Times rule, might not help the press sufficiently to carry out its democratic function and the citizens to practice their rights to freedom of information and freedom of expression. But if we accept that the burden of proof and the simple negligence standard as decisive parts of a criminal libel case will unavoidably cause a chilling effect on the freedom of the press, the New York Times rule definitely does not look like a specific American phenomenon, but a constitutional measure to follow.

It seems obviously necessary to change the chilling details of the otherwise progressive 1994 CLC decision to guarantee the really free debate of public affairs, the purpose of which is emphasized by this ruling of CLC. To reach this goal, the particular guarantees of the New York Times rule should be adopted. Following the reasoning in the 1992 CLC hate-speech decision, criminal libel should be eliminated from Hungary’s defamation law. The protection of personal reputation can be handled in civil court, with large amounts of compensation at stake, if necessary. It is not less a paternalistic approach to use criminal law to protect a defamed person than it is to protect people or groups targeted by hate speech.

As CLC emphasized in the reasoning part of its 1994 decision, leaving the burden of proof on the defendant of a libel case clearly restricts critical opinions. Suppose that a newspaper publishes an investigative report on the corruption of the state administration. Even with the best confidential sources, the journalists, the editors, the publisher and their lawyers might face an impossible challenge to prove the truth of their statements just because the administration can successfully hide at least a part of the relevant information. The burden of proof should be shifted from the defendants to the plaintiffs in the defamation cases of public officials and public figures.

Finally, the negligence standard of the liability set up by CLC is also an unnecessary and disproportionate restriction on the freedom of expression. In numerous situations, the journalists and the editors have to rush their decisions about the publication of a report. Even if they follow the basic rules of their craft — as they should in every case — they can fail to recognize all the fact-checking opportunities, which may be considered negligence, especially if the judges are often insensitive to the value of the freedom of the press.⁹⁵ The negligence test of CLC should be narrowed following the “reckless disregard” standard of the New York Times rule.

Conclusion

Even if the 1994 decision of the CLC took a great step towards providing guarantees for the “uninhibited, robust public debate,”⁹⁶ further steps have to be taken regarding the Hungarian libel law.

My proposal to introduce the New York Times rule in Hungary raises the question: What arguments oppose its full adaptation elsewhere?

¹ A Magyar Köztársaság Alkotmánybírósága [Constitutional Law Court of the Hungarian Republic] [hereinafter CLC] decision 36 (1994).

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² The Transparency in Public Life Association, a liberal Hungarian media watch group criticized, for example, that the current Hungarian government (the executive branch) works without any documentation of the meetings of the ministers. “Arnyekkormany a hatalomban” [Shadow Government in Power] A public statement by Transparency in Public Life Association. September 1, 1999.

About the freedom of information in Hungary *see, e.g.*, Zsuzsa Kerekes, Kormanyzat a napfenyben [Government in Sunshine] In: A nyilvánosság rendszerváltása [The Transition of the

Public Sphere from Dictatorship to Democracy] [hereinafter Transition] (Ed. Maria Vasarhelyi and Gabor Halmai) (Uj Mandátum Könyvkiadó, Budapest 1998).

³ See Constitutional Judiciary in a New Democracy (Ed. László Sólyom and Georg Brunner) (Ann Arbor The University of Michigan Press 2000).

⁴ See Monroe E. Price, Journeys in Media Space: Identity, Law and Technology in the Global Environment (Apr. 18, 2000) (forthcoming, ms. on file with author).

⁵ New York Times Co. v. Sullivan 376 U.S. 254 (1964). About this landmark case and other decisive parts of the history of the First Amendment jurisprudence see Anthony Lewis, Make No Law – The Sullivan Case and the First Amendment (Random House 1991). An evidence of the excellence of the book of Anthony Lewis is the late night scene on the New York subway, when I could see a young person excitedly reading that book in the company of the other riders exhausted at the very end of a long day. Writing about law so readable is a great job even in the US where a lot of “trial movies” show and generate a wide awareness of the importance of constitutional-legal issues.

⁶ See Andrew Arato, The New Democracies and American Constitutional Design (unpublished ms. on file with author).

⁷ Albert Szentgyorgyi, Az orult majom [The crazy monkey] (Magveto 1989).

⁸ As Frank I. Michelman writes:

In Number 49 of The Federalist Papers, James Madison ... asked us, in effect, to imagine the Constitution`s own founding moment as on the yonder side, before the Fall, a part of Edenic time...

Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation Tenn. L. Rev. (Winter 1989).

⁹ Lawrence Lessig, Code and Other Laws of Cyberspace 8 (Basic Books 1999).

¹⁰ Art. 61 of the Hungarian Constitution.

¹¹ Jon Elster`s metaphor of a roped Odysseus to express the nature of the constitutional self-limitation is mentioned in Andras Sajo, Limiting Government 7 (Central European University Press 1999).

¹² Art. 8 of the Hungarian Constitution.

¹³ Act 1989 on CLC, Act 1992 on the protection of personal data and on the freedom of information, Act 1993 on the ombudsmen of human rights, Act 1993 on the national and ethnic minorities.

¹⁴ Act 1989 on CLC.

¹⁵ Act 1993 on the ombudsman of human rights.

¹⁶ Act 1993 on the national and ethnic minorities. For example, German-Hungarians are a national minority while Gypsy-Hungarians are an ethnic minority.

¹⁷ 1992 law on the protection of personal data and on the freedom of information.

¹⁸ Some speech-protective constitutional rules can also limit other than state powers. For example, the Hungarian Constitutional Law Court decided, that: "To pass constitutional muster, the Act on Radio and Television must ensure that neither organs of the State nor specific interest groups be able to exert a formative influence on the content of public radio and television programs." CLC dec. 37 (1992)

The paradox is that we might need government to restrict the power of the big media (and other) corporations, but we would also need to restrict the power of the government. For example, in the United States the federal government should guarantee open access to broadband cable networks as the Center for Media Education, the Media Access Project and other public interest organizations argue. The government is only one of the possible evils, and although it might be the most dangerous one, we might have to support some of its actions to avoid different dangers.

¹⁹ Interpretation might be better than a machine. See Lessig, supra note 9.

²⁰ See John Stuart Mill, *On Liberty* (Bobbs-Merrill ed. 1956) (1859).

²¹ John Milton, *Areopagitica - A Speech for the Liberty of Unlicensed Printing, to the Parliament of England* (1644).

²² Vincent Blasi, Milton's Areopagitica and the Modern First Amendment, *Ideas*, Vol. 4, No. 2 (Fall 1996).

²³ Blasi, id.

²⁴ See, *After the Fall* (ed. Robert W. Snyder) Vol. 13, No. 3 *Media Studies Journal* (Fall 1999); *Transition*, supra note 2.

²⁵ Szentgyorgyi, supra note 7.

²⁶ As Nadine Strossen, the president of the American Civil Liberties Union writes, "the American Civil Liberties Union has challenged seven laws imposing content restrictions on cyberspeech. So far, we have won every challenge, before a total of two dozen ideologically diverse judges." (Nadine Strossen, Freedom of Speech - Issues for a new election and a new century, Campaign 2000, Media Studies Journal Vol. 14, No. 1 (Winter 2000)) Nevertheless, the question about the Internet regulation had until now developed its special history from the wide-ranging premises that it is "impossible to regulate" to "it is possible and might be better to regulate the Internet in some extent." If three or four years ago I asked my students in the media center of my University in Budapest to write about the question whether the Internet could or should be regulated or not, the usual answer was "no" for both questions. Since then the world has changed. The Hungarian Civil Liberties Union ("HCLU"), emphasizing the need for liberal principles to govern the regulation, writes about the necessity of regulating the Internet to avoid the legal uncertainty about this unique media and just to protect freedom of expression, privacy and improve the freedom of information on the Net. The HCLU argues that the Internet requires "global and specific regulation," because it is a unique media (The Hungarian Civil Liberties Union about the planned modification of the Criminal Code related to the Internet (2000)).

Lessig, supra note 9. On page 167, he goes as far as saying:

Two hundred years after the framers ratified the Constitution, the Net has taught us what the First Amendment means. If we take this meaning seriously, then the First Amendment will require a fairly radical restructuring of the architectures of speech off the Net as well.

But Baker — in the context of media regulation — ironically comments on the widely supposed impact of the new interactive technologies: "The rosy view that this new technology will eliminate all the old inadequacies of the media seems distinctly implausible." C. Edwin Baker, The Media that Citizens Need U. Pa. L. Rev. 384 (Dec. 1998).

As more and more experts warn — perhaps most strongly Lessig himself — the myth of the Internet as the medium which cannot be regulated is not true. The regulation of the Internet might be even more dangerous, as being more sophisticated and hidden from us. See, e.g., Lessig, supra note 9; Andrew Shapiro, The Control Revolution (A Century Foundation Book 1999); Eli Noam, Why the Internet Will Be Bad for Democracy? (presented at the Telecommunications Policy Research Conference, Alexandria, VA, September 1999).

²⁷ The Hungarian Constitutional Law Court abolished the death penalty in 1990 (CLC dec. 23 (1990)), but opinion polls show that the majority of the electorate might not support this decision if a referendum were to be held today.

²⁸ Since 1994, the related decisions of the Hungarian courts have often seemed to depend on the personal commitments of the individual judges. Enlightened rulings and reasonings vary with judgments and arguments, and this reflects a lack of understanding as to the 1994 CLC decision, the practice of the Eur. Ct. H.R. and the New York Times rule. See, Peter Molnar, A közszereplők bírálatának szabadsága Magyarországon [The Freedom to Criticize Public Figures in Hungary] In: Transition, supra note 2. Among others, I analyze the following cases: Boross v. Esti Hírlap and Hírlapkiadó Rt. Pesti Központi Kerületi Bíróság [Central District Court of Pest] 29.P.93.397/1995/11.; Nikolits v. HVG Kiadói Részvénytársaság, Budapesti II. és III. Kerületi Bíróság [II. and III. District Court of Budapest] 1. P. III. 22054/1997/3.; Magyar Rádió Rt. v. Országos Rádió és Televízió Testület, Fővárosi Bíróság [the Court of Budapest] 8.K. 30.073/1997/4. and 2.K. 31204/1997/6.

See also Gabor Halmai, A sajtónyilvánosság határainak módosulásai [The shifting limits of publicity in the press] and Zoltan Fleck, A véleménynyilvánítás szabadságának bírói korlátozása [Judicial restraints of the freedom of expression] In: Transition, supra note 2.

²⁹ Maria Vasarhelyi, Ujságírói autonómia és sajtószabadság [The autonomy of journalists and the freedom of the press] In: Transition, supra note 2.

³⁰ As Professor Charles Nesson, moderator of a panel discussion at Harvard Law School said, "We are the law. The people are the law. And we have to insist on some quality." (Harvard Law School Forum, March 15, 2000) It seems that the meaning of law really depends on culture. As Lawrence Lessig describes how "the British understand when they speak of their constitution, ... not just a legal text, but a way of life." (Lessig, supra note 9. p.5) In other words: law is culture.

³¹ Gabor Halmai, Változó minták és mércék – A szabad véleménynyilvánítás joga az Alkotmánybíróság gyakorlatában [Changing Patterns and Standards – The right to freedom of expression in CLC`s practice] (ms. on file with author) (February 2000)

³² CLC dec. 30 (1992).

³³ Schenk v. United States, 249 U.S. 47 (1919).

³⁴ Abrams v. United States, 250 U.S. 616 (1919).

³⁵ See, supra note 32.

³⁶ Id.

³⁷ The political elit in Hungary goes back to a long tradition of familiarizing itself with American democracy. For example, liberal leaders in nineteenth-century Hungary — most of them

enlightened noblemen —were well-versed in Alexis de Tocqueville’s famous work about the American democratic system.

³⁸ Andras Sajo, Hate Speech for Hostile Hungarians, East European Constitutional Review (Spring 1994).

³⁹ See, supra note 32.

⁴⁰ Ironically, while the 1992 CLC media decision combined the speech-protective reasoning with the restrictive holding, the 1992 CLC hate-speech decision provided a kind of opposite result: the speech-protective holding “was backed” with inconsistent reasoning.

⁴¹ See, supra note 32.

⁴² Id.

⁴³ See Justices Brandeis and Holmes concurring in *Whitney v. California*, 274 U.S. 357 (1927).

⁴⁴ See Lewis, supra note 5, chs. 8-9.

⁴⁵ CLC dec.37 (1992).

⁴⁶ See, supra note 18.

⁴⁷ Hungarian Government Executive Order no. 1047 (1974).

⁴⁸ The members of CLC are elected by a two-third majority of the Hungarian Parliament for nine years.

⁴⁹ CLC dec. 41/E/10 (1999).

⁵⁰ The National Radio and Television Board was set up by the 1995 Media Bill for supervising the legality of the work of the radio and television market. The regular reports of their monitoring department show that the governing majority of the parliament and the representatives of the executive branch of the government dominate the news programs of the public broadcast media. Although these percentages are not so far from the ones measured before the takeover of the boards, nor do they differ greatly from the numbers measured in the programs of the privately-owned broadcast media – the suppression of MTV, MR and DTV is yet another step back from unrestricted public discourse. See <www.ortt.hu>

⁵¹ Radio-televizio torveny [Act on Radio and Television] Act I (1996).

⁵² Peter Molnar, The Transformation of the Hungarian Broadcasting, In: After the Fall, see, supra note 24.

⁵³ See, supra note 47.

⁵⁴ Sajtótörvény [Act on the Press] (1986, mod. 1990, mod. 1996), art. 15, provision 3 in re CLC dec. 20 (1997). See also CLC dec. 607/B (2000), 763/B (2000) and 1316/B/4 (2000). The last three decisions answer the challenge of various speech-related provisions in the Criminal Code.

⁵⁵ About the famous Pentagon Papers case, an American example of courageous answer for prior restraint, see: David Rudenstine, *The Day the Presses Stopped* (University of California Press 1996).

⁵⁶ I have been participating in the work of the Transparency in Public Life Association since 1994, and I was a member of its elected leadership in 1999-2000.

⁵⁷ Cenzura és öncenzura [Censorship and self-censorship] Public statement by the Transparency in Public Life Association. 12 December, 1999.

⁵⁸ CLC dec. 36 (1994).

⁵⁹ Büntető Törvénykönyv [Penal Code] [hereinafter BTK] Act IV, art. 232 (1978).

⁶⁰ See, supra note 58.

⁶¹ Id.

⁶² Id.

⁶³ Id.

⁶⁴ It is possible to argue that CLC could have done it by following a more activist idea about its own role as the guardian of constitutional values, as I would have suggested. But in this case CLC chose not to do so and that could also be supported by the argument about the necessity of avoiding an overflow of activism.

⁶⁵ BTK Act IV, art. 182 (1978).

⁶⁶ See, Frederick Schauer, *The Supreme Court 1997 Term Comment - Principles, Institutions, and the First Amendment*, Harv. L. Rev. (Nov. 1998). He writes: "With few exceptions, constitutionalized defamation law applies to the same principles to a libel in the New York Times as it does to a slander over the back fence."

⁶⁷ See, supra note 50.

⁶⁸ See, the recent report about self-censorship in the Columbia Journalism Review (Spring 2000), and the film, The Insider about corporate self-censorship at work in the popular CBS program, 60 Minutes.

⁶⁹ Vasarhelyi, supra note 29.

⁷⁰ Another similar working institution is the Inter-American Commission on Human Rights of the Organization of American States (“Inter.-Am. C.H.R.”). The defamation case of Rafael Marques is a good example of international efforts to apply the requirements of international law. On March 31, 2000, an Angolan journalist, Rafael Marques — who is also a stage actor and a poet — was convicted of defaming the president of his country in an October 1999 article. The Committee to Protect Journalists and the Soros Foundation — whose coordinator in Angola is Marques — closely follow the developments of the case replete with such arbitrary procedures as disbaring Marques’s trial lawyer. “Marques was sentenced to six months in prison, but the sentence was suspended pending appeal.” <www.cpj.org> <www.soros.org>. Before the trial, Marques was arrested for forty days, and released only after an eight-day-long hunger strike for calling the president a dictator and speaking out against corruption in the president’s administration.

In a letter to the Angolan judges, Claudio Grossman, a Chilean national, member and past president of Inter.-Am. C.H.R. shows that The Universal Declaration of the Rights of Man and the African Charter of the Rights of Man and Peoples supercede national criminal laws against defamation. Grossman uses the example of Brazil, which follows Portuguese jurisprudence like Angola, and recalls how the Inter.-Am. C.H.R. established a higher standard for defamation of public officials and public figures than for defamation of ordinary citizens. Another expert in international human rights law, Kevin Boyle from the University of Essex, who also contributed to the protection of Marques, reviews the practice of Inter.-Am. C.H.R. and Eur. Ct. H.R. and lists a serious reliable national examples of speech-protective libel law starting with the 1994 CLC decision, then following with related judgments in Germany, the United States, the United Kingdom, India and Australia. (Statements on Behalf of Rafael Marques <www.soros.org/whats_new/rafael/statementx.html>)

⁷¹ The Eur. Ct. H.R. established its “necessity test” in *Handyside v. the United Kingdom* judgment of 7 December 1976, Series A no. 24.

⁷² Article 10 of the European Convention on Human Rights [hereinafter Eur. Conv. on H.R. art. 10.]

⁷³ *Lingens v. Austria* Judgment of 8 July 1986, Series A no. 103.

⁷⁴ See, supra note 72.

⁷⁵ Id.

⁷⁶ Id.

⁷⁷ Article 19 Freedom of Expression Handbook, first part of ch. 6. Content-Related Restrictions, Defamation (ed. Sandra Coliver, European Edition ed. Helen Darbishire) (Article 19, London 1995).

⁷⁸ Castells v. Spain Judgment of 23 April 1992, Series A no. 236.

⁷⁹ Article 19 Freedom of Expression Handbook, supra note 77.

⁸⁰ See, Heed Their Rising Voices (advertisement) N.Y. Times, Mar. 29, 1960, L25.

⁸¹ The New York Times Co. v. Sullivan, see, supra note 5.

⁸² A telling example of the significance of the burden of proof is a recent British case, the highly publicized defamation trial of David Irving, a Holocaust denier. Irving took out a libel action against Deborah E. Lipstadt, a professor in the US and her publisher, Penguin Books. The plaintiff stated that Ms. Lipstadt's book, Denying the Holocaust, first published in 1993 in the United States had severely damaged his reputation as a historian. The plaintiff harboring anti-Semitic sentiments sued in Britain, because British libel law puts the burden of proof on the defendants. In the Lipstadt-case — let's use her name instead of the name of a person with such an ugly opinion — the defendant happens to be from the United States where the burden in libel cases was shifted to the plaintiff 36 years ago.

On the 11 of April 2000, the Holocaust denier lost the case, and Judge Charles Gray said, "Irving has for his own ideological reasons persistently and deliberately misrepresented and manipulated historical evidence." But even if the verdict hopefully puts an end to the career of a hateful, biased historian, as the title of a New York Times editorial, History in Court expressed, he could have put history on trial. That is not a problem for truth, which can be more lively if discussed, but a problem for a legal procedure. As Walter Reich, a former director of the United States Holocaust Memorial Museum wrote in January, worrying about a conceivable victory for Irving: "...such a finding might say something about the nature of British libel law, it would say nothing at all about the reality of the Holocaust."

But recently, the British courts took significant steps toward a more speech-protective libel law, as Katherine Rimell reported in LibelLetter (Katherine Rimell, House of Lords Affirms Ground-Breaking Qualified Privilege Decision. LDRC LibelLetter (November 1999). Katherine Rimell represented The Sunday Times in the reported case. In my description I am relying on her

article.) In Reynolds v. Times Newspaper Ltd. & Ors, the House of Lords on October 28, 1999 "has in effect created a public interest protection which may shield honest mistakes made in the course of responsible journalism." In 1994, The Sunday Times alleged in an article that Albert Reynolds, former Prime Minister of Ireland "had lied to the Irish Parliament and to his coalition colleagues." The courts stated, as Rimell noted, "that the protection of qualified privilege in English libel actions may be available to protect publication of information on matters of public importance by the media to the public at large." As Rimell described, prior to the Reynolds case, the protection of qualified privilege — what "protects statements of fact which subsequently turn out to be untrue where there is a legal, social or moral duty on the maker of the statement to make it and a corresponding interest in the recipient of the statement in its content" — was not applied to the media, "except in cases of extreme emergency." Although the Times lost the case on the facts by a 3-2 majority — as Rimell quotes from the decision — Lord Nicholls, after reviewing United States law among other common law examples, emphasized in the leading judgment of the House of Lords:

The Court should be slow to conclude that a publication was not in the public interest and, therefore, the public had no right to know, ... Any lingering doubt should be resolved in favour of publication.

Lord Steyn, who wrote one of the two dissenting judgments in favour of The Sunday Times, noted that the UK Human Rights Act of 1998, which comes into force in October 2000, will require the courts to "have particular regard to the right of freedom of expression," as Rimell reported.

⁸³ It is characteristic to the American approach of hate speech that when the Ku Klux Klan organized a demonstration in Manhattan on October 23, 1999, the subject of the legal debate about the event was not the question whether the KKK could express its hateful ideas, but about the KKK-members` right to wear their traditional, possibly frightening and offensive mask during the rally. Finally, they were not allowed to demonstrate in masks, but this decision was criticized by the New York Civil Liberties Union, which represented the KKK in court for which executive director Norman Siegel received death threats. This and other critics of the ban, including a New York Times editorial (October 23, 1999) argued that it was an infringement of the freedom of anonymous speech, which could protect the speaker from the undesired consequences of his expressions. About this controversy, see New York Times, October 1999.

⁸⁴ Two examples of the vast literature see, Eli Noam, Television in Europe (Oxford University Press 1991; Monroe E. Price, Television, the Public Sphere, and National Identity (Clarendon Press, Oxford 1995).

⁸⁵ Art speech is an example for matters that might be less defensible by the instrumental justification of the freedom of expression. Direct or indirect censorship, e.g., removal of subsidies, is corroborated by the argument that the exhibitions of the work of Robert Mapplethorpe in the US or Hermann Nitsch in Hungary, for example, do not contribute to the public debate, and such communications should be restricted. About the censorship of art see Edward de Grazia, *Girls Lean Back Everywhere – The Law of Obscenity and the Assault on Genius* (Vintage Books 1993).

⁸⁶ Dworkin`s criticism is that the opinion of the Supreme Court delivered by the legendary Justice Brennan extended the tradition of the instrumental justification in the American First Amendment jurisprudence, because it was based on the instrumental justification of freedom of speech, a likely compromise to win majority vote in the court. See Ronald Dworkin, *Freedom`s Law — The Moral Reading of the American Constitution* Ch. 8 *Why Speech Must Be Free?* (Harvard University Press 1996).

⁸⁷ "Is libel dead?" Mike Godwin, a counsel to the Electronic Frontier Foundation asks in his book about cyber rights (Mike Godwin, *Cyber Rights — Protecting Free Speech in the Digital Age* 93-94 (Times Books, Random House 1998)). He writes that "if the Net (or similarly distributed and accessible successor technologies) should become the primary mass media of the next century, it`s hard to see why anyone should weep if libel lawsuits disappear altogether." He argues that "the Net, which has the potential to empower everyone to answer injurious false statements, can change" the whole context of libel law.

Kathleen M. Sullivan, the Dean of the Stanford Law School describes the world of the media before the change mentioned above: "the institutional press, governed by ethical self-regulation (as well as management self-interest) will check stories carefully and corroborate doubtful facts several times before publishing them, even in the absence of a plausible threat of suit." (Kathleen M. Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, *UCLA L. Rev.* (August 1998). George Freeman, assistant general counsel to The New York Times Company, after analyzing the legal standards for defamation also states: "Good journalistic standards may be stricter. In a free market system, the quality of the journalism ought to be more of an incentive towards responsible journalism than legal standards." (George Freeman, *Defamation* (Material for the annual Meeting of the NYSBA Committee on Media Law on the 28th of January, 2000)) Lord Nicholls wrote about another standard in his leading judgment of the earlier summarized case of *The Sunday Times*. (See, supra note 82.) He explained that "the common law does not seek to set a higher standard than that of responsible journalism, a standard the media themselves espouse." While Kathleen M. Sullivan explains that in cyberspace "libels are

no longer subject to the presumptive filter of the self-regulating institutional press." Like Godwin, she writes, that the Internet improves the possibility for answer: "Digital libel ought to be harder, not easier, to prove" as William B. Turner, who teaches in the Berkeley Journalism School, concludes for the same reason. (William B. Turner, What Part of "No Law" Don't You Understand? Wired (March, 1996)) Turner describes as one element of being a public figure, whether someone has "ready access to the media to combat an untruth published about."

Speech-intermediaries have a critical role, as Andrew Shapiro analyzes it in his book. (See Shapiro, supra note 26 ch. 18: In Defense of Middlemen) Although the Internet radically extended the possibility of the "direct criticism," the "presumptive filter" did not cover all the allegedly defamatory statements in the pre-cyberspace world either, and not only because of the quite strong presence of the tabloids. Although a posting on the Internet can potentially reach many more people, than a statement "over the back fence" (in the words of Fred Schauer, see, supra note 66), there are no middlemen next to every speaker in the "real world" either. What makes the Net-speaker so special is not only the opportunity to speak to a potentially large audience even if someone does not have access to the traditional media and to do it directly without effective editorial filter, but also the possibility to speak unidentified if someone prefers that. This second particular feature of cyber communication brings even more attention to the role of one of the most important Internet middlemen, the service providers than the intermediaries usually preserved. Even if Judith A. Lachman's triangle of the speaker, the hearer and the subject (Judith A Lachman, Reputation and Risktaking. In: The Cost of Libel: Economic and Policy Implications (Ed. Everette E. Dennis and Eli M. Noam) (Columbia University Press 1989)) - which left out the intermediaries - could fit the Internet context better if we know the speaker, in the often case of the unidentified speakers, only the middlemen could be the third corner of the triangle. But it would go beyond the limits of this study to analyze the liability of Internet service providers.

⁸⁸ Imagine the work of the New York Times rule, for example, in Africa. I know a story from an excellent documentary screened at the Margaret Mead Festival in the Museum of Natural History in New York in the fall of 1999. The title of Jean-Marie Teno's film, *Chief!* (Jean-Marie Teno, *Chief! (Chef!) Cameroon 1999*) reflects an essential part of culture in Cameroon. The ruling culture is based on a system of chiefs, although we can see and listen to the representatives of enlightened human rights and feminist organizations as well. There are local chiefs in the villages. Of course men are the absolute chiefs in marriages. (During the marriage ceremony the priest says to the bride that her husband has the right to decide where they will live even if he decides that they will go to China. The bride appears to listen to this rule with a happy smile. Although her smile does not necessarily mean that she would not try to find her way to influence

her husband's decision, there is little doubt that feminists who also speak in the film have a good reason to work for change in the women's situation in Cameroon.)

One striking characteristic story in the documentary is about an editor-in-chief of a newspaper in Cameroon who was imprisoned because he wrote about the president the following hard sentence: "The president has left the soccer game before the end of that because he might be ill." The editor was taken to prison for this, right before Christmas in spite of the fact that his wife was at the very end of her pregnancy at that time. He was imprisoned for a whole year, and the film gave a good idea that the prisons in Cameroon were like hell itself. Incredible amounts of people are seen tied in one room on a few beds. But this story provided a heroic example of the courageous answer for the suppressive system: when the editor came out of the prison, he continued his work and created a foundation for improving the conditions in prisons in his country.

In another African case reported in LibelLetter of the Libel Protection Resource Center, an organization which helps the media to protect itself in court, Bheki Makhubu published in Swaziland's only independent newspaper "that the king's latest liphovela, or fiancée, had dropped out of high school — not once but twice." As LibelLetter noted, "Makhubu, who was fired from his job as Sunday editor, faces six years in jail if convicted of the criminal libel charges that have been lodged against him." "Truth is not the issue in the case," the prosecutor said. "You can say something truthful about someone and still be charged with defamation." This description fits neatly into the concept of the old English common-law crime, the seditious libel. As Anthony Lewis writes about it: "Truth was no protection because the criminal harm lay in lowering esteem - and truth might do that most effectively. The greater the truth, the greater the libel, as the saying went." (Lewis, supra note 5, p. 52.) Understandable point, isn't it? If, for example, the charge of corruption against a public official can be proved by evidence, it can destroy his reputation. And we should not forget that whether it is logical or not, but the true critic often hurts us more than the one without any just basis. We might say: the greater the truth, the worse our reaction.

The Marques case is also a negative example (see supra note 70) but there are signs of a tendency of adopting speech-protective measures in different African countries as well. Article 19 Freedom of Expression Handbook reports that in Zambia, the courts in numerous cases ruled in favor of the newspapers, which published fact-based criticism of corruption by public officials "on the grounds that "the right of the public to be informed was much more important than the individual's right to his reputation"" (see supra note 77). The Supreme Constitutional Court of Egypt writes in a 1993 decision: "criticizing public activity through the press or other means of expression is a right guaranteed to every citizen." (Case Number 37 for the 11th Judicial Year, Decided on February 6, 1993 — The Right to Express Bona Fide Criticism of Public Officials.

Egypt's National Report of the 10th Conference of the European Constitutional Courts) <www.mkab.hu>.

⁸⁹ A lack of understanding other cultures was an obvious element of the Brooklyn Museum case during the fall of 1999. Mayor Giuliani simply missed the point that the elephant dung had a very different meaning in the home country of the African-British artist, Chris Ofili, whose painting The Virgin Mary was the main reason for furious attacks on the Museum. As the New York Times reported, the Mayor did not even want to talk to Arnold L. Lehman, the director of the Brooklyn Museum of Art about the exhibition. Seeking Buzz, Museum Chief Hears a Roar Instead, N.Y. Times, Sept. 25, 1999.

⁹⁰ As Shapiro writes (see supra note 26 p. 230), the Internet might change the work of democracies as well: "Individuals will be more responsible for upholding freedom, safeguarding democracy, and creating a civil society - and this itself is changing the nature of governance." About different conceptions of democracy and their implications to media regulation, see Baker, supra note 26; Michelman, supra note 8.

⁹¹ See Frank I. Michelman, Must Constitutional Democracy Be "Responsive"? Ethics (July 1997), In this review of Robert C. Post's book entitled "Constitutional Domains: Democracy, Community, Management" (Harvard University Press, 1995), Michelman also provides some analyses of Ronald Dworkin's Freedom's Law (see supra note 86) on the same subject.

⁹² Bill Kovach-Tom Rosenstiel, Warp Speed — America in the Age of Mixed Media (A Century Foundation Book 1999).

⁹³ As LibelLetter reported, communist-era libel laws are used against journalists in Romania, and "several have been jailed in the last ten years." (LibelLetter reported some cases from countries where the defamation law does not protect the press from the anger of political leaders. See, LibelLetter (November 1999). But in last September, the Eur. Ct. H.R. in Strasbourg vindicated Ionel Dalban, who was found guilty of criminal libel by Romanian courts. (Dalban v. Romania, App. 28114/95 (Eur. Ct. H.R. Sept. 28, 1999)). About this case see European Court Finds For Romanian Journalist, LibelLetter (December 1999). Dalban was sentenced to three months in jail (suspended), made to pay damages, and banned indefinitely from practicing journalism (set aside by a mid-level court) for publishing articles "about frauds "of almost incredible proportions" allegedly committed by the chief executive of a state-owned agricultural company" and "raised questions about the behavior of a senator, who was also the State's representative on the board" of the company, as LibelLetter reported. He died during the appellate process but his widow continued to pursue the appeals after his death. Although Ionel

Dalban`s death made his case an especially tragic event, his story showed that the Eur. Ct. H.R. — even if its practice is not as much protective for criticism of public officials as the New York Times rule — provides a platform for many journalists in the former Soviet Bloc to appeal against the decisions of the courts of their own country.

LibelLetter also noted the "extremely restrictive libel law" in Croatia, and reported cases from countries that were formerly Soviet republics. In the Belarus Republic, LibelLetter notes that the leading opposition newspaper "shut down following a court order that it pay exorbitant damages for articles the national security chief said damaged his reputation." for reporting, among others, that "Security Council chairman Viktor Sheiman had bought a house for his parents and built a luxurious summer place for himself nearby." The newspaper is to resume publication under a new title, which LibelLetter describes as "a tactic it has been forced to use several times." In Moscow, the police started a criminal libel investigation against a television reporter, Sergei Dorenko, because he charged Mayor Yuri Luzhkov and his family with corruption. LibelLetter reports: "Dorenko faces a fine and six months in jail if charged and found guilty."

As Andrei Richter, the director of the Moscow Media Law and Policy Center wrote me in e-mails, "in fact there is no difference" among the regulations of defamation, if someone criticizes a public official, a public figure, or an ordinary citizen. "Even cases such as the Lingens case would not be taken by Russian courts as a precedent," as Richter mentioned to me. (For example, the news of an armed raid - due to investigative reports on the government and criticism of the war-policy in Chechnya - in the headquarters of Russia`s largest private media company in the very first days of the presidency of Yeltsin`s successor, Vladimir Putin, provide a sad illustration of the freedom of the press in Russia. See Celestine Bohlen, Russian Security Agencies Raid Media Empire`s Offices N. Y. Times May 12, 2000.) Even against such a background it is startling that the Press Minister of Russia (what a nice position) simply stated: "I do not agree with the thesis that the state is more dangerous to the media than the media is to the state. I believe quite the opposite." (Committee to Protect Journalists — Press Freedom Reports — Putin`s Media War <http://www.cpj.org/Briefings/Russia_analysis_March00>)

In Serbia, article 62 of the Law on Public Information — passed by the Serbian Assembly October 1999 — speaks for itself:

The author of the information shall be held liable for the damages caused by publishing of the falsehood, incomplete or some other information whose publishing was not permitted, if he should fail to prove that the damages were caused through no fault of his. <www.serbia-info.com/facts/law-information.html>

Note especially the part about "incomplete or some other information whose publishing was not permitted." The reports of the Serbian Association of Independent Electronic Media (the

ANEM) on media repression in Serbia (ANEM reports are available at <www.b92.net.>) provide a lot of examples which show the "act's primary function of stifling independent media," as ANEM noted. ANEM also reported a rally and ongoing protest against the Act by the Independent Association of Serbian Journalists.

⁹⁴ See, supra note 46.

⁹⁵ Molnar, supra note 28.

⁹⁶ The famous words of Justice Brennan who wrote for the USSC in the Sullivan case.