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The Regulation of Offensive Speech in the New Hungarian Civil Code**

I Introduction

After a number of fruitless attempts at regulating hate speech (offensive speech)[1] had been blocked by the Constitutional Court in recent years in Hungary, the Parliament added a new anti-hate speech rule to the new Civil Code, which took effect on 15 March 2014. Section 2:54(5) of the new Civil Code allows private individuals to enforce a claim against offenders in cases of hate speech:

> In the event of a violation of rights committed before the wider public and seriously offensive to the Hungarian nation or to some national, ethnic, racial or religious community or unreasonably insulting for these groups in its manner of expression, any member of these groups is entitled to enforce his or her personality right in relation to him or her belonging to such groups, being an essential trait of his or her personality. The right to make a claim will be precluded after a period of thirty days from the injury. With the exception of surrendering the material advantage achieved through the violation, any member of the community may enforce any sanction available with regard to violations of personality rights.[2]

In order to eliminate any concerns related to the constitutionality of the new rule, the governing parties, relying on their two-thirds majority in Parliament, adopted the Fourth Amendment

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[1] The term 'hate speech' (offensive speech) is typically used for expressions threatening the foundations of a democratic political system and is reminiscent primarily of totalitarian ideologies. More specifically, hate speech propagates racial, ethnic or national supremacy and incites hatred for this purpose. Sajó András, *A szólásszabadság kézikönyve [A handbook of the freedom of speech]* (KJK 2005, Budapest) 133. In this paper, with regard to the above, I use the term 'hate speech' as a synonym for collective defamation, a conduct offensive to individuals through the attack towards entire communities. This meaning is reflected in the examined piece of legislation as well.

[2] 'Personality right' is a continental – especially German – concept. Under common law jurisdiction, this concept does not exist; instead, there is tort for libel etc. However, for the sake of the description of the Hungarian concept I use the expression 'personality right' with the limitations of this translation.

to the Fundamental Law shortly after passing the new Civil Code; the amended Fundamental Law now includes a provision[3] that makes it possible to sanction hate speech.

This paper will review the essential content of past attempts in Hungary in civil law to regulate the issue of hate speech, and will discuss why these attempts were problematic from the aspect of Hungarian civil and constitutional law. The paper will also analyse the relevant rule in the new Civil Code and its constitutional interpretation environment as defined by the Fundamental Law. Specific constitutionality and legal application aspects that can be identified at this stage of application will also be discussed.

Before examining the constitutionality and application of the Civil Code's hate speech rule (primarily focusing on the subjects of the regulation, the subject-matter of protection and the role of the prosecutor), I will try to answer the question whether it is a legitimate objective of legislation to regulate hate speech also as a violation of personality rights. The relevant Hungarian literature weighs the same arguments as some prominent foreign scholars[4], such as Robert Post,[5] Ronald Dworkin,[6] Edwin Baker[7] and Jeremy Waldron[8].

In my opinion, on the basis of Jeremy Waldron's arguments, it can be a legitimate objective of legislation to condemn those forms of conduct collectively known as hate speech by imposing legal sanctions on such conduct.[9] Regulation holding offenders responsible for conduct that vilifies a common trait of the members of a group, if membership of that group is a key trait of the person's character (e.g. religious conviction or national or ethnic background), may be an effective tool for progress towards social equality in a formal/procedural sense. Such a law would therefore punish a speaker who expresses, generally due to prejudice (which may have some rational or emotional basis), an opinion of racial, ethnic or religious groups or groups of vari-

[3] Article IX. (5) of the Fundamental Law states that 'The right to freedom of speech may not be exercised with the aim of violating the dignity of the Hungarian nation or of any national, ethnic, racial or religious community. Members of such communities shall be entitled to enforce their claims in court against the expression of an opinion which violates the community, invoking the violation of their human dignity, as provided for by an Act.'

[4] The thoughts of German philosophers Habermas and Gadamer are also applied to hate speech in Wright R. George, 'Traces of Violence: Gadamer, Habermas, and the Hate Speech Problem' 76 (2000–2001) Chi.-Kent L. Rev. 991.

[5] Robert Post, 'A progressive perspective on freedom of speech' in Jack M. Balkin, Reva B. Siegel (eds), *The Constitution in 2020* (Oxford University Press 2009, Oxford) 179. Robert Post, 'Hate Speech' in Ivan Hare, James Weinstein (eds), *Extreme Speech and democracy* (Oxford University Press 2010, Oxford) 123.

[6] Ronald Dworkin, 'Reply to Jeremy Waldron' in Michael Herz, Péter Molnár (eds.), *The Content and Context of Hate Speech. Rethinking Regulation and Responses* (Cambridge University Press 2012, Cambridge) 341–345.

[7] His position was also published in Hungarian in Fundamentum. Edwin Baker, 'Gyűlöletbeszéd [Hate speech]' (2008) 2 Fundamentum 5–18.

[8] Jeremy Waldron, *The harm in hate speech* (Harvard University Press, 2012) 204–235, also in Herz, Molnár (n 5) 329–340.

[9] In Hungary, hate speech has been sanctioned by the Criminal Code for longer (Section 332 of Act C of 2012). 'Any person who before the public at large incites hatred against the Hungarian nation; any national, ethnic, racial or religious group; or certain social groups, in particular on the grounds of disability, gender identity or sexual orientation, is guilty of a felony punishable by imprisonment not exceeding three years.'

ous sexual identities and, indirectly, of the members of such groups, that offends the members of the group and may incite hatred against this group in other groups of society.[10]

In this paper, I will accept that in general there is a legitimate legislative objective of regulating the issue in civil law and that the restriction of freedom of speech may be necessary and proportionate in principle in order to achieve the above mentioned goals, because nowadays 'street justice' do not seem to be suitable for condemning hateful conduct in accordance with the principles and objectives of liberal democracies.[11] As I see it, the objective of 'regulation' by civil means, which have little effect today, should be the same as the objective of legal regulation: to express a value judgement, according to which hateful conduct is negative, rather than to suppress or silence these forms of conduct. From the aspect of maintaining a democracy built on the plurality of opinions, this is a key distinction. The legitimate objective of legislation, which the courts will have to take into account when establishing the facts of the case and the amount of the *solatium doloris* (compensation for emotional damage), is not the objective of silencing these hateful voices but to ensure that those whose personality rights have been violated feel that the state and, ideally, civil society in general both find such conduct unacceptable and condemn this conduct.

In this paper, I will focus on three fundamental questions in addition to a number of minor problems. The first is whether the personality rights regulations in civil law are able to incorporate the new rules according to the logical/theoretical foundations of the law. My conclusion is that the issue can be handled within the framework of personality rights protection but only if we adopt a restrictive approach concerning legal interpretation and application. The most important restriction is that it has to be proved that the individual's personality rights have been violated. This becomes possible if we apply Article IX (5) of the Fundamental Law, enabling the 'radiation effect' of the violation.

The second basic problem I will analyse in this paper is also a constitutionality concern in connection with the adopted provision. The phrasing of the civil law rule applicable to hate speech is general, i.e. that it does not specify those historical and underprivileged groups that need to be protected by legal means in the interest of progress towards substantive equality. Not only is this generality misleading but it also contradicts the basic rules of the Fundamental Law on equality and on the possibility of restricting fundamental rights. Despite the results of the grammatical interpretation of the text of the Fundamental law, the systematic and historical interpretation suggests that it is unconstitutional if, e.g., based on the new rule, some Romani people living in an average Hungarian village were sanctioned under civil law for berating Hungarians.

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[10] Halmai Gábor, Tóth Gábor Attila (eds), *Emberi jogok [Human rights]* (Osiris 2003, Budapest) 462. See also Halmai Gábor, *Kommunikációs jogok [Communication rights]* (Új Mandátum 2002, Budapest) 114.

[11] In the area of personality rights, the scope of regulation expands continuously, partly because in a state under the rule of law social relations are no longer regulated by morality or religion but by law, and members of society primarily expect the law to respond to social issues. Sólyom László, *A személyiségi jogok elmélete [The theory of personality rights]* (KJK 1983, Budapest) 317.

Finally, I will examine whether the new Civil Code's Section 2:54 (4) violates the Fundamental Law. This rule allows the prosecutor to lay a claim if the violation of the personality right is against the public interest. The prosecutor, as an exception to the general rule, will be allowed to take action without the authorisation of the person otherwise entitled to do so.

II Requirements of International Law, Delimitation of Civil and Criminal Law Regulations, Examples in Civil Law from Foreign Countries

The following brief and illustrative[12] review will show that although international law attempts to define the principles, expectations and directions concerning the regulation of hate speech, it does not help in answering the question of how the legislator should regulate the issue and whether a solution incorporated into civil law can be effective.

The International Convention on the Elimination of All Forms of Racial Discrimination of 1965 (ICERD), a United Nations convention, expects all states parties to take action against the dissemination of racial hatred. The convention uses the term 'positive measures' to allow states to decide what methods the legislator will choose to sanction such forms of conduct.[13]

The CERD[14] stresses the importance of penalising the dissemination of ideas of racial superiority and hatred. The CERD draws attention to article 20 of the International Covenant on Civil and Political Rights, and points out that advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence must be prohibited by law. In these arguments, the need for criminal law regulations is combined with general principles, according to which laws need to be adopted to sanction forms of conduct that do not constitute specific racist actions. However, it is unknown what laws the legislator should pass and concerning what forms of conduct a civil law sanction is acceptable.

At a regional level, the Framework Convention for the Protection of National Minorities[15] prescribes some relevant obligations. 'The Parties undertake to take appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity.'[16] In this rule, the phrase 'appropriate measures' provide even fewer guidelines for the legislator on how to regulate threats of violence against communities and on what constitutes such a threat.

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[12] For more details about regulation in international law, see Gárdos-Orosz Fruzsina, 'Nemzetközi jogi standardok és magyar kísérletek a gyűlöletbeszéd büntetőjogon túli szabályozására [Standards of international law and Hungarian attempts at regulating hate speech beyond criminal law]' (2009) 1 Földrész 135–146.

[13] Article 4 of the ICERD states that 'States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination […]' In Hungary, the ICERD was implemented by Law-Decree 8 of 1969.

[14] The Committee on the Elimination of Racial Discrimination discusses the issue in Section 3 of its General Recommendation 15 concerning the interpretation of Article 4 of the ICERD.

[15] In Hungary, this convention was implemented by Act XXXIV of 1999.

[16] Article 6(2).

A commission formed within the framework of the Council of Europe[17] points out in its recommendations that states cannot remain passive concerning hate speech, racist materials distributed over the Internet and discrimination based on racist considerations in the private sphere, and that states must take action and adopt legislative reforms if need be. However, it can be established, concerning the possibility of regulating hate speech beyond criminal law, that not even the most effective regional human rights court is able to provide more reliable guidelines for legislation or the application of the law. As such, it seems that there is no European consensus regarding this matter.[18]

The framework defined for criminal law, however, cannot be applied from a number of aspects to assess the possibilities of civil law, because the subject-matter of protection is different for the two fields of law, which means that different factors are compared when the assessment is made. [19] The subject-matter protected by criminal law is public peace, first and foremost. However, in addition to the need of establishing that the public peace has been breached, the statutory definitions of crimes, to various degrees, require that absolute/subjective rights need to be directly or indirectly violated or threatened. The statutory definition of incitement against a community, however, does not require that a criminal act must be the result.

In civil law regulations, the protected legal interest is different from that of criminal law: the part of civil law that includes personality rights only protects absolute/subjective rights. Due to the history of personality rights, as presented below, the objective of regulation is, naturally, the provision of some form of protection defined by public policy for public peace; this is true for the introduction of all personality rights. However, this does not mean that the legal interest safeguarded by regulation is public peace: the civil law regulations are intended to protect the subjective/absolute rights of individuals.

Therefore, when examining civil law regulations, what international law or the constitutional criminal law of the state party expects in connection with public peace or, as part of its content, in connection with the threats against or the violation of subjective/absolute rights may not be used as a starting point, beyond some general principles. It should be noted here, to support some statements of this paper discussed below, that international law documents are in every case designed to protect disadvantaged minority groups.

International regulation may also reflect that no European hate speech regulatory regime has attempted to use civil law specifically and recently to sanction hate speech in general. Examples from foreign countries show instead that in most countries hate speech is only sanctioned by criminal law. In some states, relevant statutory provisions also appear in anti-discrimination law, media law or a separate anti-hate speech law and, in English-speaking countries, so-called

[17] European Commission against Racism and Intolerance – ECRI.

[18] Polgári Eszter, *Az összehasonlító jog az Emberi Jogok Európai Bíróságának gyakorlatában, különös tekintettel az európai konszenzus vizsgálatára [Comparative law in the practice of the European Court of Human Rights, particularly with regard to the examination of the European consensus]* (Doctoral thesis, Budapest, 2011) 45.

[19] See Constitutional Court Decision (ABH) 1992, 167, 172, see also: Halmai, Tóth (n 10) 436.

'public order acts' penalise certain forms of conduct.[20] There are, however, some unique (but not representative) exceptions that have historical roots.

For instance, the French Press Law of 1881 regulates hate speech but uses methods of criminal law (i.e. it gave the definitions of various crimes, including a definition of hate speech). However, Section 48–6 allows members of a community to make a claim (e.g. for damages) in a hate speech criminal procedure as if its members' rights had been violated directly.[21] This rule may be regarded as a step towards civil law (damages), but it is not an ideal answer to the original question of how hate speech may be regulated within the framework of personality rights.

According to Michel Rosenfeld, in Germany it is very easy to reach the level of a criminal law violation, which is why what kind of regulation the state will develop using civil law methods is not a pressing issue.[22]

In English law, the 'hatred, contempt or ridicule' and the 'to cause to be shunned or avoided' formulas have been part of case-law since 1724 and 1679, respectively, in connection with defamation tort.[23] Today, torts are considered neither private law nor public law concepts, as they contain private law, administrative law and criminal law elements.[24] It is very difficult under English tort law but by no means impossible to claim that offending a community resulted in a tort. If a group is relatively small and easily definable and thus the individual is able to prove that the offensive conduct affected each member of the group in person, or if the individual can give evidence that the statement concerning the group actually extended to the individual, a tort can be established under English judicial practice. In the *Knuppfer v. London Express Newspapers Ltd.* case, the court explained that, if a community is offended, it is up to the court to decide if the violation of rights should be applied to a member of the group.[25] Today, however, hate speech in the UK is primarily penalised by public order acts, which are of an administrative character.

Of course, the facts that there is no accurate standard in international law for the detailed regulation of hate speech and that there are no convenient models of regulation in European legal systems do not mean that the standards and methods based on applying the proportionality tests generally accepted for examining the admissibility of limiting freedom of speech would not be applicable when the Hungarian regulations are evaluated. In a nutshell, these standards suggest that freedom of speech may only be limited if it is necessary in a democratic society and if it is proportionate to the objective to be achieved.[26]

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[20] Paul B. Coleman, *Censored: how European 'hate speech' laws are threatening freedom of speech* (Kairos 2012, Vienna) 98–134.

[21] Loi du 29 Juillet 1881 sur la liberté de la presse (Law on the Freedom of the Press of 29 July 1881) The relevant rule was modified in 1996.

[22] Michel Rosenfeld, 'Hate Speech and constitutional jurisprudence, a comparative analysis' in Herz, Molnár (n 5) 268.

[23] Sólyom (n 11) 186.

[24] Sólyom (n 11) 193.

[25] Paula Giliker, Silas Beckwith, *Tort* (Sweet and Maxwell 2000, London) 293–294.

[26] Janneke Gerards, 'How to improve the necessity test of the European Court of Human Rights' (2013) 11 (2) Int J Constitutional Law 466–490.

III Hate Speech and Personality Rights in Hungary

Around the turn of the millennium, it became clear that the legal disputes related to hate speech were not resolved succesfully by voluntary means, and courts were reluctant to extend, through a simple act of legal interpretation, the existing protection of personality rights to cases when the violation of the individual's rights could have been assessed with regard to conduct offending the community. As a result, such conflicts of interest or disputes were settled neither voluntarily and amicably, nor through the state's coercive measures. In 2007, Parliament specifically wanted to codify a rule in civil law allowing a member of a community suffering a serious public grievance due to his or her member status to take legal action. The rule would have authorised civil law courts to award damages to be paid by the person expressing hatred. The provision of law amending the personality rights chapter of the Civil Code was annulled by the Constitutional Court.[27]

A common criticism of anti-hate speech regulations in civil law is that they change the civil law system of personality rights, due to primarily public law considerations. However, due to the regulatory nature of personality rights, I believe that the new regulation in Section 2:54 should rather be seen as a result of organic development and not as a forced restriction on private autonomy. This is because creating a personality right is simply allowing the law to define what conduct breaches the freedom of others and what does not breach it in the relevant field of regulation. A personality right therefore is a restriction but it is also a guarantee that autonomy will continue to exist within the new framework.[28] Below I will present how the civil law regulations based on this approach define the framework and limitations for legislative objectives in connection with the regulation of hate speech. This interpretation should be taken into account when discovering the possible interpretation and application of the new rules of the Civil Code.

1 The Unique Characteristics of Personality Rights

According to an approach rooted in Roman law, pecuniary damage is handled more individually than *iniuria* (illegal behaviour towards another person, a personal insult); with regard to the latter, even the question of whether the grievance had arisen at all depended on public perception.[29] As *iniuria* grew separate from physical assaults, it started to rely not on an abstract idea of personality and not on the status of a Roman citizen but on the current social customs.[30] The pattern of conduct was defined by public morals, and the illegal conduct, in addition to insulting the targeted person, also qualified as a violation of public order. It was the *praetor* who interpreted the content of morals, and he had to assess even if the situation was clear whether

[27] I will discuss below the reasons behind this decision.
[28] Sólyom (n 11) 274.
[29] Sólyom (n 11) 148.
[30] Sólyom (n 11) 149.

the conduct had violated morality.[31] It was very uncertain whether a claim purely based on private interest would be upheld, as publicity and public order particularly substantiated a claim.[32] However, the *iniuria* as a private delict, originally concurrent with criminal law charges, was never used to protect public morals in general, as the *iniuria* was always targeted against a specific person.

In liberalism, the state wanted to provide economic guarantees to the personality to counterbalance the dominant position of the market. With the state regulating the economy and developing social functions, the protection of personality gained direct political interpretation.[33] In the 20th century, according to Szladits, 'the socialisation of the private law order,'[34] i.e. giving strong consideration to the community's interests, was the most dominant in the Nazi approach to private law. Advocates of the new approach believed that community considerations are the foundation of all civil law rules. Such a combination of private law and elements of public law was definitely a product of the crisis at the time, that is, a natural consequence of social and economic transformation, and an increased level of government intervention was an inherent part of these developments.[35]

Private law, however, has always been an individualistic system of laws (except for in crisis periods) because its objective is to strike a fair balance between conflicting private interests. The ideal of a *bourgeois* society, in which the weak must be protected from the stronger groups, had a noticeable impact in each field of law in the course of historical development. With the emergence of modern constitutions, it was a typical 19th century phenomenon that administrative and criminal law elements were removed from private law with the reasoning that such elements belong in the constitution.[36] The rules governing equal liberty, later equal human dignity, the prohibition of discrimination and then the requirement of equal treatment went through duplication at the levels of private law and constitutional law. However, the distribution of personality protection rules between branches of the law does not mean that the objectives and principles of these rules would be different.

The general opinion is that personality rights have three 'statutory roots': internationally recognised human rights conventions, the Hungarian Constitution and the basic principles of the Civil Code. According to Szladits, the basic difference between the rights in the Constitution and the personality rights in the Civil Code is that while the human rights specified in the Constitution must influence the entire state organisation and the conduct of individuals, the personality rights in the Civil Code are only granted to persons/entities of civil law and bodies applying civil law.[37] It is a result of the triple statutory basis of the interpretation of personality

[31] Sólyom (n 11) 151.
[32] Sólyom (n 11) 149.
[33] Sólyom (n 11) 314.
[34] Staud Lajos, 'A magánjog ethizálása – vagy pedig a természet jog felé?' [Making private law ethical – or progress towards natural law?] (1926) 1–2 Jogállam 38–42, cited by Szladits Károly, *A magyar magánjog. Általános rész. Személyi jog. Első rész. [The Hungarian Civil Law]* (Grill 1941, Budapest) 36.
[35] Szladits (n 34) 37.
[36] Szladits (n 34) 40–44.
[37] Gábor Jobbágyi, *Személyi jog [The law of persons]* (Novotni 1996, Miskolc) 51.

rights that the Civil Code's provisions analysed in this paper must be applied and interpreted in accordance with the foundations. In this section, I wanted to point out that these foundations can be identified not just in public law but also in the historical development of private law. For these reasons, it is not unacceptable for civil law to incorporate anti-hate speech rules.

2 The Dignity of Communities

After concluding that hate speech might be regulated as a personality right issue, I will examine, in connection with Section 2:54 of the Civil Code, what civil law and constitutional law limitations may be identified in the course of interpretation. One such factor, which I believe also appears at the constitutional level, is that communities have no right to human dignity.

It is a valid argument in connection with the regulation of hate speech in the effective text of the Fundamental Law that the Fundamental Law itself creates a right to human dignity, even if this is inconsistent with the past practice of the Constitutional Court.[38] I will argue against this interpretation below.

Although Article IX of the Fundamental Law declares that the right to freedom of speech may not be exercised with the aim of violating the dignity of the Hungarian nation or of any national, ethnic, racial or religious community (it therefore uses the concept of communities' dignity), in the very next sentence the text claims that freedom of speech may be restricted not in the interest of the dignity of communities but in order to guarantee the right to human dignity of individuals belonging to the community. The dignity of communities therefore does not appear in the Fundamental Law as a right but instead it is used as a constitutional value or a state objective.[39]

Consequently, a distinction must be made between the dignity of communities as a constitutional value worthy of preservation and the right of communities to human dignity. The latter is a concept that is difficult to interpret, even within the framework of the Fundamental Law. Only specific individuals, belonging to or not belonging to communities, may have a right to human dignity. This right is granted to each of them, regardless of their membership of communities and is equally granted to all of them.

It cannot be concluded on the basis of Article IX of the Fundamental Law that a law restricting the freedom of expression with the legitimate objective of preserving the dignity of communities would not be justifiable with regard to the first sentence of Article IX (5) of the Fundamental Law, which states that the right to freedom of speech may not be exercised with the aim of violating the dignity of the Hungarian nation or of any national, ethnic, racial or

[38] In Decision 96/2008. (VII. 16.) AB, the Constitutional Court specifically stated that communities are not granted the right to human dignity.

[39] For more information about the concepts of rights, values and state objectives etc. in the constitution, see Gárdos-Orosz Fruzsina, '8. § [Az alapjogok korlátozhatósága] [Article 8. The possibility of restricting basic rights]' in Jakab András (ed), *Az Alkotmány kommentárja [A commentary of the Constitution]* (2nd edn, Századvég 2009, Budapest) 398–400.

religious community. However, in the course of applying the so-called test of necessity and proportionality, it must be taken into account whether the basic right is restricted for the purpose of promoting another basic right or only for promoting a constitutional value or objective. If a law was passed on the basis of the first sentence of Article IX (5) with the valid legislative objective of protecting the dignity of communities, the possible degree of restricting the freedom of expression under this rule would be significantly lower than the level of restriction introduced by Section 2:54 of the Civil Code.[40]

This is so because, with regard to the provision analysed in this paper, the legitimate legislative objective for which the freedom of expression is restricted is the human dignity of an individual acting in his or her capacity as a member of a community. This is confirmed by the text of Article IX (5) of the Fundamental Law: 'Members of such communities shall be entitled to enforce their claims, as provided for by an Act of Parliament, in court against the expression of an opinion which violates the community, invoking the violation of their human dignity.' Consequently, the first sentence of Article IX (5) of the Fundamental Law is more like a declaration and a specification of a state objective, and the freedom of expression is restricted in this case, even according to the Fundamental Law, on the basis of the protection of the right to human dignity. This approach is also consistent with the general logic of civil law.

3 The Content Neutrality Principle: the Interpretation of 'Seriously Offensive' and 'Unreasonably Insulting' Conduct

As opposed to the anti-hate speech regulations common in foreign legal systems that sanction specific content regardless of the consequences,[41] the rule of the Hungarian Civil Code is content-neutral to some extent, because it requires the conduct to be of such gravity that is capable of achieving a seriously offensive or unreasonably insulting result. The violation of the personality right, therefore, does not simply consist of the expression and perception of the hateful content: the speech must have a seriously offensive and unreasonably insulting effect.

When Section 2:54 of the Civil Code is applied by the courts, it will be a key test when a 'violation of rights'[42] will qualify as a violation of rights committed before the wider public and is seriously offensive or unreasonably insulting for these groups in its manner of expression, whether this criterion will apply to the community or individuals belonging to the community, and to what extent this test will be objective or whether it will be individualised based on the person seeking legal remedy. When this is assessed by the courts, they will surely take the evaluation criteria developed for defamation cases in judicial practice into account and, in addition

[40] Ibid 423–426. The notion that the possibility of restricting the freedom of expression is different when the goal is to protect the dignity of communities is confirmed by the following decisions of the Federal Constitutional Court of Germany: 68 BVerfGE 93, 266 (1994) 269; BVerfGE 90, 241 (1994).

[41] For instance, the statutory definitions of Holocaust denial in many European countries.

[42] Beyond the fact that the term 'violation of rights' in the context does not make much sense grammatically, it is also an unsuitable term here because, as discussed below, neither constitutional law nor civil law grants rights to communities.

to identifying general guidelines of interpretation, the constitutional interpretation (as necessary also with regard to the general principles of the Civil Code) in specific cases will have to be found in such a manner that the court does not restrict the freedom of expression unnecessarily and disproportionately.[43]

According to Section 2:54 of the new Civil Code, a member of the relevant community may make a personality right claim in the event of a violation of their rights committed before the wider public and seriously offensive to or unreasonably insulting for the community in its manner of expression. It follows from the content in the previous sections that, in a personality rights context, an insult to the community rather means that the hateful conduct shown towards the community actually insults or hurts an individual belonging to the given community. A violation of rights may therefore only qualify as a violation of rights under civil law if it is indeed a violation of the rights of an individual belonging to the community in question.

On the basis of the grammatical interpretation of the phrase 'a violation of rights committed before the wider public and seriously offensive or unreasonably insulting for the community in its manner of expression', we may conclude that a less vulnerable community (such as the Hungarian nation) is less sensitive to the same insult as a vulnerable and disadvantaged minority.

The part of the rule in Section 2:54 of the Civil Code analysed in this section therefore moves back closer to the content neutrality principle, thus allowing the courts to impose sanctions for hate speech in particularly serious cases, taking the standard of necessity and proportionality into account.

4 The 'Radiation Effect'

The next question to be discussed in connection with the civil law regulation is whether it is possible at all to establish the violation of the individual's rights, an indispensable component of a personality rights violation, in the event of a violation affecting the community. The 'radiation effect' principle of German law[44] may help in resolving this dilemma. Earlier attempts at regulating the issue under civil law in Hungary adopted this German legal principle, and the significance of this principle was pointed out by the Constitutional Court and also by the President of the Republic, who raised constitutionality concerns. Although, in connection with Section 2:54 (5) of the Civil Code, neither the text of the law nor the statement of reasons mentions the 'radiation effect' theory, my argument is that the relevant rule of the Fundamental Law actually allows the 'radiation effect' to be used. However, I will argue below that the 'radiation effect' may only be applied in very limited circumstances to the individual as a violation of personality rights caused by conduct offensive to or insulting for a community.

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[43] Gárdos-Orosz Fruzsina, *Alkotmányos polgári jog? Az alapvető jogok alkalmazása a magánjogi jogvitákban [Constitutional civil law? The application of fundamental rights in disputes under private law]* (Dialóg Campus 2011, Budapest) 118–146.

[44] *Ausstrahlung,* see Ralf Brinktrine, 'The Horizontal Effect of Human Rights in German Constitutional Law' (2011) 6 European Human Rights Law Review 421, 424.

The Constitutional Court of Germany found in the *Soldaten sind Mörder* decision that in principle a statement concerning a collective of individuals may in principle affect the honour of individuals. As the German Constitutional Court puts it, the radiation effect '[c]an primarily occur regarding statements made about ethnic or racial origin, or about physical or mental attributes if the inferiority of the entire affected group and each and every member of this group may be derived from the statement.'[45] According to the logical/theoretical foundations of German constitutional law, the insult must be intentional, with the primary goal of humiliating the victim. It must be taken into consideration whether the statement has been made as part of a debate or whether there has been a situation (such as a political campaign) that impacted the significance of the statement.[46] The theoretical concept of the 'radiation effect' first appeared in Hungarian law in 2007, when the civil law sanctioning of hate speech was introduced and the personality rights chapter of the Civil Code (Act IV of 1959) was amended.[47] However, the amendment was annulled by the Constitutional Court [Decision 96/2008. (VII. 3.) AB] following[48] the President of the Republic's petition for a preliminary review of constitutionality.[49]

The decision of the Constitutional Court states that the right to human dignity is only granted to natural persons as a basic right; communities do not have this right. The Constitutional Court, however, recognised that an injury suffered by the community as a result of a message communicated within the scope of the freedom of expression may qualify as a violation of the rights of an individual, who may in turn take legal action. The violation of the fundamental right to human dignity and the related protection may in this case limit the freedom of expression.

However, the large number of communities referred to in the amendment, the statutory presumption of belonging to the community, the unrestricted right of persons claiming to be members of the community to file a claim, and the possibility of non-governmental organisations and foundations taking action did not confine the restriction of the freedom of expression to the necessary minimum. Quite the contrary: these factors lifted all boundaries to the restriction.

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[45] *Soldaten sind Mörder* BVerfGE 93, 266, 304. (1994) Rn. 142.

[46] For a summary of the German Constitutional Court's practice, see Horst Dreier, *Grundgesetz Kommentar [Commentary to the Basic Law]* (Mohr-Siebel, 1996) Art. 5. I, II. 422–424. Rn 216–221.

[47] Section 76/A A public and seriously insulting conduct targeted at race, national or ethnic minority status, religious or ideological conviction, sexual orientation or sexual identity and applying to a group of persons constituting a minority in society but sharing this characteristic shall constitute a violation of personality rights. […] The person violating the right may not use the defence that the conduct has not been directly and recognisably directed against the particular person or persons making a claim on the basis of the violation defined in paragraph (1). The claims made under Section 84(1) may also be brought by public benefit non-governmental organisations or foundations, the objective of which is the protection of civil and human rights. A claim made under Section 84(1)(e) may only be brought by the aforementioned organisations in the interest of the insulted community and to the benefit of a public benefit foundation established for this purpose. Regarding the claims stated in paragraphs (1) to (3), the statement of claim may be filed within 90 days from the violation of the right. The right to make a claim will be precluded after the expiry of this deadline. <http://www.parlament.hu/internet/plsql/ogy_irom.irom_adat?p_ckl=38&p_izon=3719> accessed 1 November 2015.

[48] Constitutional Court Decision (ABH) 2008, 921, 923.

[49] For a detailed analysis of this regulation and the constitutional law environment, see Gárdos-Orosz Fruzsina: 'Kísérlet a gyűlöletbeszéd elleni fellépés magánjogi szabályozására [An attempt at regulating anti-hate speech efforts in private law]' (2007) 3 Állam- és Jogtudomány 441–465.

The reform of the private law regulations of hate speech therefore failed, partly because the legislator had not made the criteria of the 'radiation effect' strict enough. As a result, in 2008, new legislation was adopted, but instead of amending the Civil Code, a separate Act of Parliament was passed regarding the issue. However, the President of the Republic did not promulgate the legislation passed by Parliament[50] but sent it to the Constitutional Court due to constitutionality concerns.[51] The President's request pointed out that the 'radiation' of the injury of the community to the members of the community is very difficult to establish in practice. This method of regulation is particularly problematic due to the logical/theoretical foundations of law and constitutionality and so it is very rarely used in foreign legal systems, and even then it is subject to quite a few restrictions. The possibility of establishing 'radiation' depends primarily on the relationship between the group and its members: the relationship must be very strong to accept that an insult to the group violates the absolute/subjective rights of a member. The nature of this relationship depends also on the size of the group and how distinguishable it is. The smaller the group, the more distinguishable it is from non-members, which makes 'radiation' to group members more likely. The larger the group, the smaller is the impact of the insult on each member. According to the President of the Republic's position (developed on the basis of the relevant Constitutional Court decisions of 2008), if the legislator allows 'radiation', its application will only meet the criteria arising from the regulation of the right to human dignity if the individual continues to have personal autonomy in all phases of the procedure and may request the court to issue a judgement in his or her particular case.[52]

According to Constitutional Court decision no. 96/2008. (V. 17.) AB, the subjective/absolute right of the individual will only be violated if the person's relationship with the given community is such an integral part of the person's identity and integrity that the injury of the community 'radiates' to the member of the community. Radiation will only take place if the conduct is directed against an essential trait of the individual's personality. Only in such cases is it possible to apply a method under civil law that restricts the freedom of expression.

In earlier decisions, the Constitutional Court found that religious conviction and the status of belonging to a minority qualify as essential traits of a person's character.[53] A ruling of the

[50] 'A person shall violate the personality rights of members of the group if he/she shows a conduct before the wider public that insults a group defined by nationality or ethnic status, religious conviction or sexual orientation if the aim of the conduct is to trigger fear or humiliation, or it causes fear or humiliation. No sanctions may be imposed if the person is able to prove that, based on all the circumstances of the case, his/her conduct insulting the group has not been so serious that would result in a violation of the members' personality rights.' Act no. T/6219, Section 1.

[51] <http://public.mkab.hu/dev/dontesek.nsf/0/29B1F1B8D128815DC1257ADA00525508?OpenDocument> Last accessed at 14 November 2015.

[52] The President's petition is still pending before the Constitutional Court (in 2013). As the new President of the Republic failed to supplement the petition in connection with the bill's unconstitutionality under the Fundamental Law, the procedure will likely be closed without the Constitutional Court assessing the merits of the case.

[53] Religious conviction and minority status were qualified as essential and new character traits in Decision 4/1993. (II. 12.) AB and Decision 22/1997. (IV. 25.) AB, respectively.

Supreme Court also considered sexual orientation as an essential trait.[54] It can be concluded on the basis of international legal literature and Hungarian legal practice that the majority of human attributes may not be used to define such groups in which the attribute would establish a strong connection between the community and the individual.

I referred to it above that, in very limited cases, courts would be able to use the 'radiation' theory even under the currently effective text of the Civil Code to recognise the individual's right to make claims against conduct insulting the community. For this purpose, it would be sufficient to deduce that the general provision of personality rights in the Civil Code has such a constitutional content. From the aspect of the logical/theoretical foundations of the law, no separate rule is required for this, neither in Hungary nor abroad.

However, the courts have not shown any willingness to recognise the right of individuals to bring claims. In the interpretation process, courts should establish whether the particular filter between the community and a member of the community (as the personality of a person in its entirety is influenced to various degrees by him/her belonging to different communities and by the particular situation) can let through the injury suffered by the community in the circumstances on which the legal dispute is based and apply it to the individual and thus whether the violation of rights suffered by the community can be translated into a violation of the individual's rights. Section 2:54 of the Civil Code specifies the protected communities and may also guarantee the protection of the freedom of expression if only such conduct is penalised that is seriously offensive or unjustifiably insulting to vulnerable groups. The principle of radiation acts as a strong filter in this case.

When establishing the facts of the case, the court would be able to take into account that, in accordance with the above, the Hungarian nation may not be considered as a vulnerable group allowing any attack against the group to radiate to the individual, not even if the Hungarian nation is specified as a protected group by legislation.

5 Right of Self-Determination in the Lawsuit

In addition to the constitutional and civil law issues discussed above, there is another clear constitutionality concern in connection with Section 2:54 of the Civil Code.

Section 2:54(5) of the new Civil Code allows private individuals to enforce a claim against offenders in cases of hate speech: The new Civil Code's Section 2:54 (4) allows the prosecutor to bring a claim but in a way that, as an exception to the general rule, the prosecutor will be allowed to take action without the authorisation of the person otherwise entitled to take action.

[54] Ruling no. Pfv. IV.20687/2005/5. Cited in Kárpáti József, 'Az utolsó próbatétel: Ítélet a Háttér Társaság kontra Károli Egyetem ügyben. [The last trial: Judgement in the Háttér Társaság vs. Károli University case]' (2005) 3 Fundamentum 108.

> If the personality right violation is against public interest, the prosecutor may file a statement of claim with the approval of the person otherwise authorised to file a statement of claim, and may request the court to impose any sanction of the violation for which no fault need to be proven. The financial advantage gained as a result of the violation must be used for a cause of public interest on the basis of the prosecutor's statement of claim. In the event of a violation referred to in paragraph (5), this rule must be applied with the difference that the prosecutor may file a statement of claim within the statute of limitations period without the approval of a person otherwise authorised to file a statement of claim.

The Constitutional Court has examined, in a number of cases, the constitutionality of the prosecutor's participation in civil cases.[55] In connection with the litigants' right of disposal in the procedure, the Constitutional Court pointed out that it means that the litigants will be entitled to exercise the right of disposal freely concerning the litigant's substantive and procedural rights. The right of free disposal includes the right to make a claim and the right to waive it. Therefore, in an actio popularis case, the litigant's right of disposal is taken away, which puts the litigant's right of self-determination at risk because, save for a constitutionally justifiable exceptions, no one is allowed to enforce another person's right before court independently from that person's will.

Decision 96/2008. (VII. 16.) AB, which assessed the constitutionality of the hate speech regulations adopted in 2007, established that claims under personality rights may only be made in person due to the nature of such rights. For this reason, non-governmental organisations may not be authorised to decide on enforcing a claim in a personality right matter independently from the person whose right has been violated. It is part of the individual's right of self-determination to decide whether and to what extent he/she wishes to remedy the violation personally by taking legal action against the person responsible for the violation.

With regard to the limits defined by constitutional law, the new Civil Code only allows the prosecutor to take action in very limited circumstances. Section 2:54 (4) of the Civil Code only authorises the prosecutor to file a statement of claim if the personality right violation is against the public interest and, if this is the case, the approval of the person otherwise authorised to file a statement of claim is required.

However, the rules applicable to hate speech are different. The third sentence of Section 2:54 (4) of the Civil Code states that the prosecutor may file a statement of claim within the statute of limitations period without the approval of a person otherwise authorised to file a statement of claim. The statement of reasons in the amendment to the bill submitted before the bill was voted states the following:

> In the interest of the individual's right of self-determination, it must be guaranteed that the individual's consent is required for the prosecutor to initiate public interest litigation on the basis of the violation of rights suffered by the individual. With regard to the new deadline for enforcing the right as specified in Section 2:53 (5), the prosecutor's right to file a statement of claim needs to be regulated in the procedures under paragraph (5). However, with regard to this deadline, it must be regulated that the prosecutor is allowed to file a statement of claim without the affected person's approval beyond the thirty-day

[55] Decisions 9/1992. (I. 30.) AB, 1/1994. (I. 7.) AB and 20/1997. (III. 19.) AB.

deadline but within the statute of limitations period. Through this, the proposed amendment achieves the public interest objective that a collective violation of personality rights will not escape sanctions if no member of the community decides to enforce their rights within the thirty-day deadline. Collective personality right protection is only justifiable with regard to certain fundamental rights, otherwise the freedom of expression would be impaired.

There is one key difference between the prosecutor's claim and the individual's claim: the prosecutor may only request the court to impose sanctions for which no fault need to be proven,[56] which means that the prosecutor may not demand *solatium doloris* from the person responsible for the violation. It is a rational restriction: as the prosecutor does not enforce the claim of individuals, there is no violation for which the prosecutor would be entitled to compensation.

The regulation is self-contradictory and it may be impossible to resolve this. This is because the new Civil Code authorises the prosecutor to file a statement of claim with regard to hate speech not in the individual's place, 'representing' the individual, but in the name of the injured community. This is clearly expressed by the following sentence in the statement of reasons: '[t]he proposed amendment achieves the public interest objective that a collective violation of personality rights also violating public interest will not escape sanctions if no member of the community decides to enforce their rights within the thirty-day deadline.' This regulation is based on the principle that the violation of the right must be penalised, even if those affected by the violation choose not to take their case to court. It is a similar reasoning according to which the state must protect, in addition to individuals, the interests of society and the smaller communities within society through legislation, because hateful content is harmful for democratic processes and peaceful coexistence. If the prosecutor has an independent right to file a statement of claim, the prosecutor will be able to represent the interests of the community.[57]

However, as explained above, communities are not subjects/entities of private law, so it is impossible to handle injuries to communities (or, as the statement of reasons of the proposed amendment puts it, 'a collective violation of personality rights also violating public interest') under private law. The right to enforce a claim granted in this way is alien to private law from all conceivable aspects. The prosecutor enforces a claim in the name of another person; also, the person on whose behalf the prosecutor acts is not a recognised subject/entity of private law, and

[56] A person whose personality right has been violated, with regard to fact of the violation, within the statute of limitations period and depending on the circumstances of the case, may request the court to establish the fact of the violation, demand the violation to be discontinued and the person responsible for it to be prohibited from future violation, demand that the person responsible for the violation make amends and, if necessary, that the person responsible, at his/her own expense, make amends publicly; demand the termination of the unlawful situation and the restoration of the preceding situation by and at the expense of the person responsible, demand to have any property item created as a result of the violation destroyed or deprived of their violating nature, and demand the person responsible for the violation or his/her legal successor to transfer to the injured person the financial advantage gained as a result of the violation subject to the rules of unjust enrichment.

[57] According to András Sajó, '[a]lthough the state acts on behalf of another person to ensure the proper operation of the communication space, the Hungarian (and, for instance, the German) approach does not oppose this at all.' Sajó (n 1) 152.

therefore has no personality that may be violated. The objective to be reached is clear, but the selected method is erroneous from the aspect of the logical/theoretical foundations of the law. The correct approach would have been if the regulations on public interest litigation had been included in public law legislation instead of the Civil Code with regard to the public law nature of regulation.[58] This would also allow public law sanctions (reflecting the original objective of the action), such as a public interest fine, to be imposed on those expressing hate.[59]

IV The New Constitutional Framework of Section 2:54 (4) and (5) of the Civil Code

The Fourth Amendment to the Fundamental Law supplemented Article IX on the freedom of expression in an attempt to lay the constitutional foundations of a number of items in Section 2:54 of the Civil Code.[60] The Amendment, however, did not affect Article II on the right to human dignity, which declares that the subjects of this right are human beings, or Article I on the possibility of restricting fundamental rights, which states that rights (including the right to human dignity and the freedom of expression) may be restricted if the requirements of proportionality and necessity are met.[61]

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[58] Administrative law, for instance, would be more suitable for regulating this issue. Some legal scholars believe that, for instance, the Act on Equal Treatment would be suitable for incorporating anti-hate speech regulations. See Legény Krisztián, 'Szólásszabadság és tolerancia [Freedom of speech and tolerance]' (2004) 6 Belügyi Szemle 193; Kántás Péter, Fórika László, 'A közméltóság védelmében [Protecting public dignity]' http://jesz.ajk.elte.hu/kantas14.html.

[59] Pap András László, 'A polgári törvénykönyv esete a gyűlöletbeszéddel [The Civil Code's affair with hate speech]' (2007) 9 Beszélő 43.

[60] Following the Fourth Amendment, the following provisions comprise the constitutional environment of Section 2:54 of the Civil Code: 'Human dignity is inviolable. Everyone shall have the right to life and human dignity; the life of the foetus shall be protected from the moment of conception.' (Article II of the Fundamental Law) 'The inviolable and inalienable fundamental rights of MAN shall be respected. It is the primary obligation of the State to protect these rights. Hungary recognises the fundamental individual and collective rights of man. The rules for fundamental rights and obligations shall be laid down in an Act. A fundamental right may only be restricted to allow the application of another fundamental right or to protect a constitutional value, to the extent absolutely necessary, proportionate to the objective pursued and with full respect for the essential content of that fundamental right. Fundamental rights and obligations which by their nature apply not only to Man shall be guaranteed also for legal entities established by an Act.' (Article I of the Fundamental Law) 'Everyone shall have the right to freedom of speech. The right to freedom of speech may not be exercised with the aim of violating the human dignity of others. The right to freedom of speech may not be exercised with the aim of violating the dignity of the Hungarian nation or of any national, ethnic, racial or religious community. Members of such communities shall be entitled to enforce their claims, as provided for by an Act of Parliament, in court against the expression of an opinion which violates the community, invoking the violation of their human dignity.' (Article IX of the Fundamental Law) Another relevant provision is Section 5 of the Fundamental Law's closing and miscellaneous provisions, which declares that Constitutional Court rulings given prior to the entry into force of the Fundamental Law will no longer be effective. This provision is without prejudice to the legal effect of those rulings.

[61] The concept of inviolability, which was part of the Constitution in effect until 2012, never meant that what it referred to could not be restricted. See Gárdos-Orosz (n 39) 403–404.

However, the new paragraph (5) of Article IX of the Fundamental Law states that '[t]he right to freedom of speech may not be exercised with the aim of violating the human dignity of others.' Also, according to the Fundamental Law, the right to freedom of speech may not be exercised with the aim of violating the dignity of the Hungarian nation or of any national, ethnic or religious community.

According to the relevant reasoning of the Fourth Amendment to the Fundamental Law, the proposed text's objective is to declare, at the level of the Fundamental Law, that human dignity may restrict the freedom of expression, and to lay the constitutional foundations for the possibility of penalising certain forms of hateful expressions by civil law means if the dignity of communities is violated. As it was not possible to combat hate speech effectively at the level of Acts of Parliament, it is justified to amend the Fundamental Law to this end. The proposed amendment's objective was to provide protection against communication violating the dignity of the listed communities.[62]

The *Amicus Brief for the Venice Commission on the Fourth Amendment to the Fundamental Law of Hungary,*[63] edited by Gábor Halmai and Kim Lane Scheppele, includes a separate chapter evaluating this rule of the Fundamental Law. I concur with the following statements of the chapter: according to this opinion, one interpretation of the new rule of the Fundamental Law is that the amendment forms an exception, a lex specialis applicable to the assessment of restrictions on the freedom of expression and overriding the general limitation clause of Article I(3) of the Fundamental Law. However, the Amicus Brief claims that this would clearly run counter to practice recognised by international law. According to the author's opinion this is because the Fundamental Law permitted the necessary restriction earlier and therefore the only possible reason behind the amendment is to introduce a different standard, a lower protection to the freedom of expression than required based on the necessity and proportionality tests.

The Amicus Brief examines European examples and trends to conclude that the restriction of the freedom of expression to such extent in the interest of the Hungarian nation as a community is not acceptable in a democratic society, not even if the restriction is made through civil law means.[64]

To resolve the contradictions of the Fundamental Law, Imre Vörös recommended a solution that conforms to the theoretical/logical foundations of law and allows, through a loophole, a constitutional interpretation that meets European requirements to be reached.[65] In his opin-

[62] <http://www.parlament.hu/irom39/09929/09929.pdf> last accessed 14 November 2015.

[63] Amicus Brief for the Venice Commission on the Fourth Amendment to the Fundamental Law of Hungary. Authors: Miklós Bánkuti, Tamás Dombos, Gábor Halmai, András Hanák, Zsolt Körtvélyesi, Balázs Majtényi, András László Pap, Eszter Polgári, Orsolya Salát, Kim Lane Scheppele, Péter Sólyom and Renáta Uitz. Editors: Gábor Halmai, Kim Lane Scheppele, (2013) 3 Fundamentum. This particular chapter was written by Orsolya Salát. 31–37.

[64] Ibid 35.

[65] Vörös Imre, 'Vázlat az alapvető jogok természetéről az Alaptörvény negyedik és ötödik módosítása után (Az AB döntése, a Velencei Bizottság és az Európai Parlament állásfoglalásai) [About the Nature of Fundamental Rights after the Forth and the Fifth Amendment to the Fundamental Law]' (2013) 3 Fundamentum 61–64.

ion, a fundamental right is by definition a right with a special status and its essential content may not be restricted at all. The constitution, by incorporating a limitation standard specifying the framework of restricting fundamental rights by law, actually codifies the 'absolute, unrestricted standard' and all laws passed in connection with the fundamental right must be assessed on the basis of this standard. The special standard may not violate the general standard specified in the Fundamental Law, in contrast with the principle of civil law regulation, which is built on private autonomy. It is safe to conclude therefore that, for example, a rule affecting human dignity may not restrict the right to human dignity itself. If the content of the fundamental right understood to be part of the original standard is restricted in the Fundamental Law itself, there will be two contradictory standards in the Fundamental Law, and therefore the fundamental right will not be able to play its 'benchmark' role for legislation. According to Imre Vörös's paper, in such cases it is unclear whether the fundamental right should be understood with the content established with regard to the restriction standard of the Fundamental Law or with the content restricted by other provisions of the Fundamental Law, which makes the content of the fundamental right uncertain.[66]

Imre Vörös's conclusion is that the legislator in this way may remove from constitutional scrutiny any law regulating fundamental rights. Due to this irresolvable contradiction in the logic of law, the affected fundamental rights will not be able to serve their legal protection function in accordance with the requirement of legal certainty.

The content of Article IX (5) of the Fundamental Law is uncertain due to other provisions of the Fundamental Law, the general interpretation framework of the basic right and the obligations under international law based on Article Q of the Fundamental Law. As a result, Article IX (5) alone will not explain the constitutional content of Section 2:54 of the Civil Code. It is beyond doubt that Section 2:54 (4) and (5) need to be assessed within a new constitutionality framework and the existing practice of courts and the Constitutional Court must be re-evaluated. However, there is no clean slate, and the above prove that the freedom of expression and, naturally, the right to human dignity both have a core, an essential content and restriction standard that will not be changed in a democratic society, not even by the adopter of the constitution, the legislator or the courts.[67]

[66] The Fourth Amendment to the Fundamental Law includes a number of other examples to this phenomenon beyond the hate speech regulations. For instance, the new paragraphs (2) and (3) added to Article VII as a result of the amendment make the fundamental right conditional in a way that is likely to be incompatible with the restriction standard of Article I of the Fundamental Law. Similarly, the new paragraph (3) of Article IX concerning political advertisements during elections presumably restricts the same right in violation of the general restriction standard; the above fundamental right therefore will not apply to election law and a constitutionality review is impossible.

[67] Section 2.3 of the statement of reasons of Decision 143/2010. (VII. 14.) AB refers to this.

V Closing Remarks

I have described in the article what attempts at regulation in civil law had been made in the international and domestic regulatory environments before the Hungarian legislator decided to impose sanctions on hate speech within the framework of personality protection in the new Civil Code. I presented that this rule, alien to civil law at first glance, is indeed acceptable from the aspect of both civil law and constitutional law. However, it may only be accepted with significant interpretation constraints. One constraint is that communities do not have the right to dignity, which is only granted to individuals. As a result, imposing sanctions under civil law on hateful conduct is only possible if the conduct offending or insulting the community 'radiates' to the individual and takes the form of a violation of the person's subjective/absolute right. This is possible in very limited circumstances, but the principle of the radiation effect and its well-established criteria help in the identification of such circumstances.

In addition, the regulations in Section 2:54 of the Civil Code are unconstitutional for two reasons, despite the fact that the Fourth Amendment to the Fundamental Law was intended to lay a foundation for the interpretation of the Civil Code rules (albeit unsuccessfully in my opinion). In the paper, I argued that it is unacceptable that a member of the Hungarian nation may lodge a civil law claim in the event of a conduct insulting or offending the Hungarian nation because the restriction of the freedom of expression is not justifiable for the purpose of reaching a legitimate objective defined by the legislator in this particular case. I have shown that the rule in the regulations in question, allowing the prosecutor to file a claim, violates the constitutional requirements concerning the right to self-determination in litigation.

My objective in this paper was not to explore and describe the original intent of the legislator, the conduct of individuals will be determined primarily not by the text of the new law but by legal consciousness and the way the rule will be applied in judicial practice. [68] For these reasons, I attempted to identify, on the basis of an analysis of the relevant rules in the Fundamental Law, the narrow path of constitutional interpretation that meets other provisions of the constitution and the relevant international human rights standards. [69]

The judge is bound by the foundations of the existing legal system. From the aspect of basic principles, individual branches of law cannot be considered as completely separated. Judicial

[68] 'A law that primarily relies on the state's coercive measures is inefficient. [...] The purpose of the law is to provide a general norm or measure that members of society can adapt to in advance. This applies to the law, which is general in nature, and the decisions made in individual cases when the judges specified individual rules to apply in the given situation; these rules help us draw general conclusions about the interpretation of the law.' Szladits (n 34) 16.

[69] Could it be that the restrictive interpretation would simply mean in practice that a conduct that would otherwise qualify as incitement in criminal law would also generate a civil law clam that may be enforced in an adhesion procedure or a separate procedure? It is a consistent practice of criminal courts today that only compensation for the damage arising as a direct result of the criminal act may be claimed in the criminal procedure and compensation for damage arising as a consequence beyond the direct damage may not be enforced. (BH 1983. 148., BH 1985. 138., BH 1984. 439.) In an adhesion procedure, despite the above, the *solatium doloris* claim could not have been enforced despite the fact that incitement was established.

practice must define the boundaries of violations of the law that are seriously offensive and unreasonable in their manner of expression taking into account all arguments concerning the protection of minorities, the constitutional limitations of the freedom of expression and the true nature of anti-hate speech efforts, as such arguments may be used as a starting point in interpretation. If the interpretation is too broad or inconsistent, it may lead to a disproportionate restriction on the freedom of expression.