

2005/11/11 - I. ÚS 453/03: HUMAN DIGNITY

HEADNOTES

All the agendas of state institutions, as well as the activity of persons active in public life, e.g. the activity of local and national politicians, officials, judges, attorneys, or candidates or trainees for these offices are a public matter; of course, the arts, including journalistic activities and show business, and everything which attracts public attention, are also a public matter. These public matters, or the public activities of individual persons, may be judged publicly. In constitutional terms, the criticism of public matters carried out by publicly active persons is subject to the presumption that the criticism is constitutional. This is the expression of a democratic principle, the expression of participation in public matters by members of a civil society. The presumption of constitutionality protects only an evaluative judgment, not the claiming of facts, which the critic himself must prove by evidence to the degree that they served as the basis for the criticism.

Another general rule which can be derived from European case law is that if anyone wishes to publish information of a defamatory nature about someone else, his conduct can not be considered reasonable or legitimate unless he proves that he had reasonable grounds for relying on the truthfulness of the defamatory information which he disseminated, unless he proves that he took proper available steps to verify the truthfulness of that information, to a degree and in an intensity in which it was possible for him to verify the information, and finally, unless he himself had no grounds to believe that the information was untrue.

The publication of such information also can not be considered reasonable if the disseminator of the information does not verify its truthfulness by inquiring of the person whom the information concerns, and does not also publish that person's position, with the exception where such steps are impossible or evidently unnecessary.

To evaluate the legitimacy of publishing information it is important to examine the motive for its publication. It can not be concluded that publication of information was legitimate if the dominant motive for it was the desire to damage the defamed person, if the disseminator himself did not believe the information, or if he provided it irresponsibly, without due concern for whether it was or was not true.

Honor is also an integral and important component of human dignity. It also forms the basis of many decisions made by members of a democratic society, which are fundamental for it to function well. Honor plays a role in relationships, such as whom an employer hires, or whom an employee wants to work for, it is decisive in decisions about who is to advance to higher employment or official positions; honor is important for deciding with whom to begin business relations or whom to vote for in political life. If honor is once sullied by an unsubstantiated accusation expressed publicly, and all the

more so in the media, a person's reputation and honor can be damaged forever, and especially in a situation where there is no possibility of rehabilitation. If such a situation arises, both the person himself and the society lose. And it is precisely for that reason that one can not assume that protection of reputation, or honor, is an important matter only for the affected individual or his family. For these reasons the protection of reputation or honor must be seen as protection of a public good. Therefore, it is in the public interest for the honor and reputation of persons active in public life not be discussed at factually altered levels. Both in the field of politics and in the media a voter must be able to distinguish good from evil, so that he can in the end make an informed choice in relation to a politician and to the media.

The fundamental right to honor is exercised in multiple spheres: the private sphere, the societal, civil and professional spheres; the last three can be described as the social sphere. The first sphere actually involves protection of privacy, where the right to honor is undoubtedly also applied. It is fundamentally up to each individual, what from that sphere, and to what extent, he will release as information for the outside world.

The societal, civil and professional levels reflect the social nature of the fundamental rights, or reflect the fact that an individual lives in a society, and enters into communication with its other members, and through his conduct, or even through his very existence, influence other members of the society.

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE REPUBLIC

A Panel of the Constitutional Court of the Czech Republic, composed of its Chairwoman Michaela Židlická, judge Eliška Wagnerová (Judge-Rapporteur) and Vlasta Formánková decided on 11 November 2005 in the matter of a constitutional complaint filed by the complainant I. B., represented by JUDr. H. Ch., attorney, against a decision by the High Court in Prague of 6 December 2001, file no. 1 Co 147/2001, and a decision by the Supreme Court of the CR of 21 May 2003, file no. 28 Cdo 1395/2002, with the participation of the High Court in Prague and the Supreme Court of the CR as parties to the proceedings, as follows:

I. The decision of the High Court in Prague of 6 December 2001, file no. 1 Co 147/2001, and the decision of the Supreme Court of the CR of 21 May 2003, file no. 28 Cdo 1395/2002 violated the complainant's fundamental rights to preservation of his personal honor and good reputation guaranteed by Art. 10 par. 1 of the Charter of Fundamental Rights and Freedoms.

II. Therefore, these decisions are annulled.

REASONING

I.

In a constitutional complaint sent to the Constitutional Court by the deadline provided by Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations (the "Act on the Constitutional Court"), the complainant seeks the annulment of the decisions cited in the introduction because he believes that the decisions of the general courts violated his constitutionally guaranteed fundamental rights, specifically the right to personal honor and a good reputation under Art. 10 par. 1 of the Charter of Fundamental Rights and Freedoms (the "Charter"), and the right to judicial protection under Art. 36 par. 1 of the Charter.

In the decision cited in the introduction, the appeals court amended a decision by the City Court in Prague of 28 February 2001, file no. 37 C 115/99 - 100 by denying the complainant's complaint that the defendant (the secondary party, Ing. M. Z.) arrange the publication of an apology in the daily newspaper Mladá Fronta DNES within 15 days after the decision went into effect, with dimensions of at least 8.5 cm (two columns) x 3 cm, in the editorial section of the newspaper, with the following wording: "I apologize to the journalist I. B. for untrue statements saying that he wrote at the order of České energetické závody [Czech Energy Company], with whom he had a confidential agreement, and for accusing him of corruption" and that he pay the complainant CZK 300,000. The appeals court also awarded compensation of trial costs.

The complainant filed an appeal against this decision, on which the Supreme Court of the CR ruled in the decision cited in the introduction, and denied under § 243b par. 2 of the Civil Procedure Code.

In his constitutional complaint, the complainant states that, in his journalism he focuses primarily on ecological topics. The grounds for the above-mentioned court dispute were several verbal attacks by the secondary party, in the office of prime minister, against the complainant, which took place in the Chamber of Deputies on 29 June 1999, in a Česká Televize [Czech Television] program on 30 June 1999, in broadcasts on the station Český rozhlas - Radiožurnál on 3 July 1999, and at a press conference in the Lidový dům [People's House] on 16 July 1999. According to the complainant, the secondary party expressly

stated in the Chamber of Deputies, referring to testimony from the general manager of ČEZ, Ing. Č., this claim: “Since you constantly want some concrete evidence of corruption among journalists, let me give you some. There is a journalist named I. B. This journalist wrote for the magazine Reflex and may still write for it. This I. B. wrote articles in support of the completion of the Temelín nuclear power plant. There’s nothing wrong with that, of course. I, as you well know, also support completion of that electric power plant. However, this I. B. had a confidential agreement with České energetické závody, which means that he wrote at the order of České energetické závody, and that’s what I consider a form of corruption.” In the Česká televize program the secondary party allegedly added to that claim: “And if you’ll allow me, you will be the first journalists whom I’ll tell something which I have not yet had an opportunity to say. You know that yesterday I accused the editor I. B., who subsequently filed a criminal report against me, of being paid - in whatever manner - for his articles supporting the completion of the Temelín nuclear power plant, by the company ČEZ. I know that the ČEZ press secretary denied this report. Of course, I also know that about a month ago the general manager of ČEZ, Mr. Č., informed me that the agreement had been entered into, and that he had cancelled it. What does that indicate? In that case either the press secretary of ČEZ is not telling the truth, or the general manager of ČEZ is not telling the truth. And that alone is reason enough to investigate these matters, whether they concern foreign countries, whether they concern transportation, whether they concern energy, because corruption is terribly hard to prove.” In the broadcast on Český rozhlas - Radiožurnál the secondary party allegedly said this: “I publicly give you the following information, that some time ago, about a month ago, I watched a TV program which I think is called “Nahraně,” and that program contained discussions about Temelín. There, with Mr. B. present, an environmental activist accused him of writing articles supporting nuclear energy for ČEZ, for ČEZ’s money. However, by coincidence, shortly afterwards, because he was invited to a government meeting about Temelín as an expert, I met with the new general manager of ČEZ, Mr. Č. And I told him: look, Mr. Č., I support the completion of Temelín, but I heard in this program that Mr. B. is writing about you for your money, under an agreement. And I think that that isn’t right, that everyone should promote himself through his opinions, not through corruption. Mr. Č. then said to me, literally, and in the presence of witnesses: Mr. B. is not our employee, he only has a contract with us. I took note of that information. But allow me to continue. Mr. Č. is now saying that he gave me erroneous information. He issued a statement to that effect. Fine, then I will tell you something else. A few weeks after that - and now, to tell the truth, I don’t know where, it was at some reception where we met - the general manager, Mr. Č., came to me and told me: I cancelled that contract with Mr. B. And I took note of that. And now I ask you both, because you’re editors, a simple question: all right, I admit that I could be mistaken and that perhaps no such contract exists. To err is human. But can you cancel contracts that don’t exist?” At a press conference in Lidový dům, in response to a direct question from the complainant, whether there is evidence of his corruption, the secondary party answered: “The course of your case has been the following. Phase number one: in the TV program “Nadoraz” you were accused by an environmental activist of writing propaganda materials for ČEZ for money. You were present at that program, and I don’t want to elaborate on it now, because that was really phase number one. In other words, this accusation came from a different person, and publicly, even before coming from me. Phase number two: in the presence of witnesses I asked the general manager of ČEZ, Mr. Č., and said, although I support nuclear

energy, just like you do, but I consider it somewhat immoral when your company pays for articles by journalists, if what was said in the program “Nahraně” is true. I can publicly say that the general manager of ČEZ said: Mr. B. is not our employed, but he has a contract with us. And he said that in the presence of witnesses. And phrase number three, Mr. B.: shortly afterwards Mr. Č. was in the presence of witnesses again at some reception in the Lichtenštejn Palace and informed me that he had cancelled the contract with you. So these are three absolutely clear arguments on which I rely.”

The complainant is aware that, just like politicians, so he too, as a journalist, is subject to heightened scrutiny, and must bear possible criticism for his opinions and positions; nonetheless, such criticism may not be untrue, or, with regard to character, a dishonoring accusation. Because the complainant considered the above-mentioned accusation of corruption to be considerable detriment, which endangered his honor and good reputation in professional circles and in society (and he didn't have long to wait for the consequences), he asked the general courts to protect his honor and dignity.

The above-mentioned decision by the court of the first level granted the complainant's complaint, but that decision was then changed by decision of the appeals courts. The complainant criticizes the two appeals courts, saying that their decisions interfered in his fundamental right to personal honor and a good reputation, as well as in his right to a fair trial. The complainant argues that he is aware that criticism of an individual's conduct which is based on circumstances about which true information is given can not generally be considered inconsistent with § 11 of the Civil Code, even if the criticism used a corresponding measure of irony, condemnation and repudiation of the criticized conduct of the individual. In contrast, the use of criticism, irony, condemnation and rejection of the conduct or activity of an individual about which untrue information is given is generally palpable, unjustified interference in the individual's right to protection of his personality, and this involves considerable intensity of unjustified interference, which will usually have unfavorable consequences on the afflicted person's status. As the complainant says, the secondary party's accusation was the first accusation of corruption of a journalist by name, and it involved suspicion of corruption by an industrial concern, which, from the point of view of a journalist, is considered the worst. The complainant is afraid that he will be disadvantaged in any future expert dispute with environmental activists for this reason. The complainant specifically disagrees with the opinion of the appeals court which found the information about the corruption of the complainant to be true, because the secondary party obtained it from a trustworthy person. The complainant objects that the testimony before the court of the first level and before the appeals court was inconsistent on many points, and appears untrustworthy and self-serving. He certainly cannot agree that calling a journalist corrupt was actually the exercise of the right to criticize, which can not be subject to proof of truthfulness. Primarily, however, the complainant believes that the secondary party can not rid himself of responsibility by pointing out that the source of information is relevant. In his opinion, a mere reference to a relevant person can not be allowed to rid the bearer of a report of responsibility. Only if he is performing his reporting duties can it be allowed that, if he is conveying information about a particular event of public interest, the right to information and its dissemination can be given priority over protection of personality. And in cases of conflict between these rights it is the duty of the

courts to weigh, taking into account the circumstances of each case, whether one right was not given unjustified priority over the other right. This case, however, did not concern the tradition conflict of the media and a politician, as usually happens in cases of conflict between the right to information and the right to protection of personality; instead, in the instant case the journalist was a “target” who unwillingly found himself in “a kind of long standing battle between journalists and politicians,” and, moreover, was in an unequal position. The complainant also disagreed with the claim that the court evaluated the statements which followed the ČEZ statement and which refuted the report of possible corruption or writing for pay as some kind of statement at the request of the media or the plaintiff. On the contrary, the complainant believes that these statements were an answer to questions related to the fact that both ČEZ and its general manager denied the report of a contract, and the questions related to evidence of corruption. As regards the decision of the second appeals court, the complainant says that he expected that the Supreme Court of the CR would handle the objections which were set forth in the appeal on a point of law, which did not happen. Although the second appeals court itself said in the reasoning of its decision that the first appeals court did not have an easy task, it only repeated the case law applied and concluded, without justifying it, that the application of § 11 and § 13 of the Civil Code and the interpretation of them can not be considered inconsistent with the text of these provisions in the published case law of courts.

In view of the foregoing, the complainant proposes that the Constitutional Court enter a judgment annulling both the decisions of the general courts cited in the introduction.

On behalf of the party to the proceedings, the High court in Prague, the chairwoman of the panel, JUDr. N. Ž., responded to the constitutional complaint; she said that she refers in full to the reasoning in the contested decision.

On behalf of the Supreme Court of the CR, the chairman of the panel, JUDr. J. R., responded to the complainant’s filing; he said that the constitutional complaint does not present any concrete criticism of the steps taken by the first and second appeals courts in the proceedings in terms of procedural regulations, or against the legal evaluation of the matter in the decisions of these courts, that would contain anything other than disagreement with the evaluation of the evidence admitted by the appeals court. Therefore, in terms of the application and interpretation of provisions of the Civil Code and the Civil Procedure Code by the first and second appeals courts in the instant case, the complainant’s constitutional complaint can not be seen as justified. Evaluation in terms of constitutional law regulations is up to the Constitutional Court, as the panel chairman stated.

The secondary party, Ing. M. Z., responded to the constitutional complaint to the effect that he relied on information from the then general manager of ČEZ, and he regards the claim that he should have verified that information as absurd. He also stated that he subjectively believes that the information from the then general manager of ČEZ was true. Of course, the Constitutional Court did not take this statement into account, because the secondary party was not represented by an attorney under § 30 par. 1 of the Act on the

Constitutional Court.

The Constitutional Court also determined from public sources that the Syndicate of Journalists of the Czech Republic prepared a Journalist's Ethical Codex, which it called on all Czech and Moravian journalists to observe voluntarily, regardless of their membership in the Syndicate. Under Art. 1 let. i) of that document, a journalist is obligated to accept only assignments appropriate to his professional dignity, and under Art. 2 let. d) he is obligated not to misuse the profession of journalist for the work of an advertising worker and not to accept any direct or indirect compensation from potential advertisers. The Constitutional Court also determined from the Declaration of Principles of Journalistic Conduct, promulgated as a norm for professional conduct of journalists, which was approved at the 2nd world congress of the International Federation of Journalists in Bordeaux held on 25-28 April 1954 and subsequently amended at the 18th world congress of the International Federation of Journalists in Helsingore held on 2-6 June 1986, that a journalist shall consider the acceptance of any form of bribe to be serious professional misconduct.

II.

The Constitutional Court determined the following information from the file no. 37 C 115/99:

In 1999 the complainant wrote an article on nuclear energy for the magazine Reflex. Having been approached by the press secretary of ČEZ, a.s. after the article's publication, he gave consent to ČEZ using it for its needs, on the condition that it would be printed with an announcement that the article was being re-printed with the author's consent, without entitlement to payment (pp. 29, 64).

In the television program "Nahraně" aired on 22 March 1999, the environmental activist J. B. said to the complainant: "You are not an objective journalist, because ČEZ is printing your articles as a paid advertisement."

On 12 May 1999 in the vestibule at the Office of the Government, the then general manager of ČEZ, a.s. told the secondary party (then prime minister), in response to his express question, that ČEZ did not employ journalists, and did not employ the complainant. If journalists worked for it, then it was "by contract" (pp. 50, 52).

The next day the general manager issued an instruction to annul the contract with the complainant, based on the information from the prime minister, provided to him the day before, about the fact that ČEZ was using the complainant's article, and being convinced, without having seen the actual publication of the article, that everything was being respected, i.e. convinced that a payment must have been made to the complainant on the

basis of the contract with him (p. 50).

A few weeks later, at an unspecified reception, the secondary party, the former prime minister, met with the former manager of ČEZ, and the general manager of ČEZ informed him about the above-mentioned actions (pp. 30, 50, 52).

On 28 June 1999, after a meeting of the government, a press conference was held at which the prime minister spoke about the corruption of journalists (p. 70) in connection with the presentation of politicians in the media. The then minister of foreign affairs, J.K., spoke on the same issue, directing his remarks at the person of the former minister of foreign affairs, J. Zieleniec. The journalists present criticized the members of the government for speaking of the accusations of ex-minister Zieleniec publicly without presenting evidence (p. 77). The prime minister said that he had received from the minister of foreign affairs a list of four media agencies which were alleged to represent J. Z.; at the same time, however, he said that he would disclose their names, in response to the request of J. K. only after J. K. met with J. Z., and would investigate the suspicion that excessive funds had been spent for the personal promotion of J. Z. J. K. presented a critique of J. Z. and his work, and informed the journalists that he was investigating the circumstances surrounding the selection of agencies for promoting foreign policy during the term of office of minister Z., as well as the reasons for their high fees (pp. 71, 72). The prime minister then closed the answers to the journalists by stating that he trusted the members of the government and their information, and unless he were to be convinced of the contrary, he had no reason to apologize to J. Z.

On 29 June 1999, in the vestibule of the Chamber of Deputies, journalists again pressed the prime minister to disclose the list of agencies which were alleged to have created a better image of ex-minister Z. for high fees, which he refused to do, although he did say that he would disclose a case of corruption of journalists. He then made the first statement now contested by the complainant (pp. 2, 8, 9, 10, 14, 95, 96).

Reports from ČTK and internet dailies from that day contain the complainant's denial of the accusation of corrupt conduct. (P. 10).

Media reports of 30 June 1999 concerning the secondary party's declaration of 29 June 1999, i.e. reports provided by the media the following day, contain a statement from the press secretary of ČEZ, a.s. which says that the current management of the company had never paid the complainant and that there was nothing to suggest that the former management of ČEZ, a.s. had done so. These reports also contain a statement from the general manager of ČEZ, a.s. in which he stated with regret that he had informed the prime minister erroneously about the relationship between ČEZ and the complainant, based on incomplete information, and he apologized to both gentlemen (pp. 11, 12, 15).

On 30 June 1999 the secondary party basically repeated the contested statements in a program on ČT [Czech Television], and added that he was aware of the denial given to the media by the press secretary of ČEZ, a.s., and also said that about a month earlier the general manager of ČEZ, a.s. had told him that the contract with the complainant had been entered into and that he had cancelled it. The secondary party concluded from the general manager's information that either the press secretary or the general manager of ČEZ, a.s. was not telling the truth (p. 2).

On 3 July 1999, in a panel discussion on Radiožurnál, the secondary party described the genesis of the contested statements from the TV program "Nahraně" after the general manager's denial, and added, "I admit that I could be mistaken, and that no such agreement existed; to err is human. But how can you cancel a contract that doesn't exist?" (p. 35).

On 16 July 1999, in response to the complainant's question whether there was evidence of his corruption, which he raised at a press conference in the Lidový dům, the secondary party basically repeated what he had said on 3 July 1999 on Radiožurnál, without, of course, adding the information about the press release of ČEZ and the press lease of the general manager (p. 3).

III.

Before the Constitutional Court could turn to evaluation of the matter on the merits, it was required, in view of its own case law (III. US 28/96), consider the question whether the secondary party M. Z. (originally the defendant) even had passive standing in the original suit. After evaluating the matter, the Constitutional Court concluded that the secondary party did have passive standing in the original suit, and that the instant matter differs significantly from the above-mentioned decision of the Constitutional Court.

The suit by the weekly Respekt against minister J. L. (the former minister of agriculture) concerned a refusal to provide information, which was contained in a letter signed by J. L. In denying the constitutional complaint, the Constitutional Court concluded, among other things, that the minister's letter must be considered to be a decision by an administrative body.

The matter being addressed today differs significantly from the matter in file no. III. US 28/96. The minister's decision to not provide information fell within his ministerial jurisdiction as substantively defined by statute. Minister L. was thus acting in a matter which was within his jurisdiction. In contrast, the secondary party in the instant matter was prime minister of the government of the CR at the time when he made the contested statements, but the government, as a constitutional body, can not be assigned responsibility for these statements, because their content, i.e. giving information about the results of an investigation led by the prime minister himself concerning the complainant's alleged conduct and evaluation of that conduct in terms of criminal law is not, under any circumstances, a matter which falls within the jurisdiction of the

government. The government does not have investigative authority at any of the levels in which it functions, i.e. not if it is performing political functions, nor if it is performing administrative functions. Therefore, if the government, or any member of it, or even the prime minister, obtains information on conduct which could be considered a crime, the government is not authorized to handle it, in the sense of investigating it, and it is even less so authorized to evaluate it legally and inform the public about its conclusions. If any member of the government commits such conduct, he is impermissibly stepping outside the bounds of his authorization as a member of the government, or even prime minister. Such conduct by a member of the government is conduct *ultra vires* in terms of jurisdiction; it is not binding on the government, and the government, as a body acting on behalf of the state, can not be held responsible for it. Therefore, the member of the government who commits such conduct is responsible for it as an individual - i.e., among other things, in a potential lawsuit for protection of personality he himself is a person with passive standing. This finding does not rule out taking into account, in further substantive evaluation of the case, precisely the fact that the contested statements were made by a member of the government, or even its prime minister, (see below).

Because the constitutional complaint met all the formal requirements required by the Act on the Constitutional Court, the court could turn to substantive evaluation of it.

IV.

The subject of evaluation in the instant case is whether the general courts (the High Court and the Supreme Court) interfered in the complainant's fundamental right to preservation of his honor and good reputation (Art. 10 of the Charter) by, on the contrary, providing protection to the fundamental right to freedom of expression, to the benefit of the secondary party, the original defendant.

A) The fundamental right to freedom of expression must be considered a constitutive element of a democratic, pluralistic society, in which everyone is permitted to express his opinion on public matters and to make evaluative judgments about them.

All the agendas of state institutions, as well as the activity of persons active in public life, e.g. the activity of local and national politicians, officials, judges, attorneys, or candidates or trainees for these offices are a public matter; of course, the arts, including journalistic activities and show business, and everything which attracts public attention, are also a public matter. These public matters, or the public activities of individual persons, may be judged publicly. In constitutional terms, the criticism of public matters carried out by publicly active persons is subject to the presumption that the criticism is constitutional. This is the expression of a democratic principle, the expression of participation in public matters by members of a civil society.

The presumption of constitutionality protects only an evaluative judgment, not the claiming of facts, which the critic himself must prove by evidence to the degree that they served as the basis for the criticism.

The requirement that the critic himself prove the claimed facts is a European constitutional standard (e.g. decision of the House of Lords of 28 October 1999 in the matter *Reynolds v. Times News Papers Limited*, or the decision of the German Constitutional Court (BVerfG) of 3 June 1980, 1 BvR 797/78 in the case of *Böll*, which is also confirmed by the case law of the European Court of Human Rights - the ECHR - e.g. decision of the Grand Chamber of 17 December 2004 in the matter *Pedersen and Badsgaard v. Denmark*).

Another general rule which can be derived from European case law is that if anyone wishes to publish information of a defamatory nature about someone else, his conduct can not be considered reasonable or legitimate unless he proves that he had reasonable grounds for relying on the truthfulness of the defamatory information which he disseminated, unless he proves that he took proper available steps to verify the truthfulness of that information, to a degree and in an intensity in which it was possible for him to verify the information, and finally, unless he himself had no grounds to believe that the information was untrue.

The publication of such information also can not be considered reasonable if the disseminator of the information does not verify its truthfulness by inquiring of the person whom the information concerns, and does not also publish that person's position, with the exception where such steps are impossible or evidently unnecessary (see *Reynolds*, cited above).

To evaluate the legitimacy of publishing information it is important to examine the motive for its publication. It can not be concluded that publication of information was legitimate if the dominant motive for it was the desire to damage the defamed person, if the disseminator himself did not believe the information, or if he provided it irresponsibly, without due concern for whether it was or was not true.

Facts alleged to be defamatory must always be evaluated comprehensively, from many points of view, which can be expressed in the following points (concurring, see *Amicus Curiae Opinion of the Venice Commission of 17 March 2004, CDL-AD(2004)011*):

1. The gravity of the charge. The more serious the charge is, the more the public was misinformed and the defamed person damaged, if the claim is not true.
2. The nature of the information and a consideration of the degree to which the problem at hand is a matter of public interest.
3. The source of the information. Some disseminators of information do not have direct knowledge of the event. Some have their own reasons to diffuse information or are paid for their stories.
4. The effort expended and concrete steps taken to verify the truthfulness of information.
5. The status of the information. The charge may already be the subject of investigation,

which must be taken into consideration.

6. The urgency of the matter. News is often a commodity which spoils quickly.
7. Whether comments were requested from the complainant (plaintiff). He may have information which is not available to others or which they did not disclose. A request to the complainant (plaintiff) need not always be necessary.
8. Whether an announcement spread by the media contained the substance of the matter seen through the eyes of the complainant (plaintiff).
9. The tone of the announcement spread by the media. The originator of information spread in the media can initiate discussion or investigation. He need not present the charge as a disclosure of fact.
10. The circumstances of the publication, including the timing.

As regards the evaluative judgments, including exaggeration and hyperbole, even if they were harsh, they are not in and of themselves a non-permitted expression. Even the unsuitability of the critic's opinion, in terms of logic or the prejudice of the critic do not, by themselves, permit the conclusion that the critic went beyond the bounds of expression that can be described as appropriate. Only in the case of criticism of matters of actions by public persons which completely lacks a substantive basis, and for which no justification can be found, is it necessary to consider such criticism disproportionate. It is always necessary to evaluate the entire expression made in a literary, reporting, or other format; one can never judge a single expression or sentence taken out of context.

Only if the free expression, thus understood, comes into conflict with other legal values protected by the constitutional order (the immanent limitation of fundamental rights - see judgment file no. Pl. US 42/02) or statutes pass for a purpose for which free expression can be limited under Art. 17 par. 4 of the Charter (rights and freedoms of others, the security of the state, public security, public health, or morals), do conditions exist for testing a concrete expression from the points of view cited above. In evaluating these requirements in a concrete matter, it is necessary to weigh the legal values generally and specifically applied in the matter and standing in opposition to each other.

B) A person's honor and good name are values which belong in the cultural heritage of our civilization, with its roots in Christianity and Judaism ("A good name is to be chosen rather than great riches, loving favor rather than silver and gold." Proverbs 22:1). However the content and scope of this value may change over time, we can conclude that it includes the rules which appear in the ethical codices of various professions, i.e. including the profession of journalist.

Honor is also an integral and important component of human dignity. It also forms the basis of many decisions made by members of a democratic society, which are fundamental for it to function well. Honor plays a role in relationships, such as whom an employer hires, or whom an employee wants to work for, it is decisive in decisions about who is to advance to higher employment or official positions; honor is important for deciding with whom to begin business relations or whom to vote for in political life. If honor is once sullied by an unsubstantiated accusation expressed publicly, and all the more so in the media, a person's reputation and honor can be damaged forever, and especially in a situation where

there is no possibility of rehabilitation. If such a situation arises, both the person himself and the society lose. And it is precisely for that reason that one can not assume that protection of reputation, or honor, is an important matter only for the affected individual or his family. For these reasons the protection of reputation or honor must be seen as protection of a public good. Therefore, it is in the public interest for the honor and reputation of persons active in public life not be discussed at factually altered levels. Both in the field of politics and in the media a voter must be able to distinguish good from evil, so that he can in the end make an informed choice in relation to a politician and to the media. It is precisely in view of these considerations that agreements on human rights, just like the Charter, do not consider freedom of expression to be an absolute right (see above).

The fundamental right to honor is exercised in multiple spheres: the private sphere, the societal, civil and professional spheres; the last three can be described as the social sphere. The first sphere actually involves protection of privacy, where the right to honor is undoubtedly also applied. It is fundamentally up to each individual, what from that sphere, and to what extent, he will release as information for the outside world. In other words, this sphere is usually governed by self-determination as regards information, which can not be intervened in from outside.

The societal, civil and professional levels reflect the social nature of the fundamental rights, or reflect the fact that an individual lives in a society, and enters into communication with its other members, and through his conduct, or even through his very existence, influence other members of the society. In this second level we can not insist on complete self-determination regarding information; in other words, under certain circumstances one can intervene at this level. Thus, the social spheres can be interfered in through proportional interventions undertaken for purposes of protecting the interests of society. Because the rights to personal honor and a good reputation guaranteed by Art. 10 par. 1 of the Charter (this right is not independently guaranteed by the Convention) can not be limited by ordinary statutes, whose purpose would be set forth by the Charter as public values (as, for instance, in the case of freedom of expression), potential limitations of this right must be sought in the category of immanent limitations, i.e. limitations arising directly from the constitutional order itself. Such an immanent limitation of the fundamental right to honor can also be found in the requirement for protection of freedom of expression, which is also constitutionally protected (see above).

V.

In evaluating the matter from a constitutional viewpoint, the Constitutional Court began with the fact that the complainant, as a journalist - a commentator - is a person active in public life, and therefore his professional activity, in particular, may be subject to public criticism. However, the secondary party must prove the truthfulness of facts claimed in the critical statement, and the critical opinion expressed by him is subject to a test under the principle of proportionality.

The Constitutional Court also evaluated the secondary party's statements and concluded that, with the exception of legal evaluation of the complainant's alleged conduct, they were claims of fact.

Thus, the Constitutional Court subjected the secondary party's statements, insofar as their truthfulness was determined by the High Court, to the test described in part IV.

Re 1) The Constitutional Court primarily reviewed the starting point of the High Court, which based its decision on evaluating the contested statements by the secondary party to the effect that the defendant truthfully informed the journalists about the statement by the general manager of ČEZ and also identified him as the source of his information. Insofar as the secondary party described these statements as corruption, this was his opinion, which, by its nature, is not subject to proof of truthfulness.

This evaluation of the secondary party's statements appears to the Constitutional Court to be flawed. In the first contested statement, made on 29 June 1999, the secondary party did not limit himself to repeating information which he had received from the general manager of ČEZ, a.s. The manager testified as a witness before the High Court. The witness never spoke of a "confidential contract" between the complainant and ČEZ. In the opinion of the Constitutional Court, the use of the term "confidential contract," which the secondary party used in the context of providing "evidence" about the corruption of a journalist, can be classified as a statement containing a claim of fact, which was intended to strengthen the argument about the impropriety of the complainant's alleged conduct. In contrast, as shown by the evidence admitted by the High Court, the information from the general manager about contracts with journalists, was neutral in terms of evaluating contracts with journalists.

Also, one can not conclude from the total context of the information provided (originally this was an interview concerning alleged corruption of journalists on the part of J. Z.) that the purpose of providing information was to give information about what the general manager of ČEZ told the secondary party.

However, what is of primary importance is evaluation of the fact that it is not the role of the prime minister to provide information to journalists about a statement from the general manager of ČEZ, even though this was a commercial company owned in considerable part by the state. It is unacceptable for the statements of the prime minister to be evaluated as if he were the press secretary of a private commercial company.

In this light, the High Court's comparison with the printed media received by reports ("svodka") of the Police of the CR appears quite inappropriate. This is because an important function of the printed media is precisely to provide un-commented information, i.e. reportage. A paper owned by a private legal entity is fully entitled to rely on the truthfulness contained in the official records of the Police of the CR, because the

truthfulness of official information provided by state bodies needs to be presumed, for reasons explained below. However, the secondary party provided at a minimum a report with comments, and precisely through his commentary strengthened the gravity of the accusation contained in his statement. It was clear from the evidence admitted by the court of the first instance that this was a serious accusation, affecting the area of the complainant's good reputation and professional honor under the journalistic codex, which also had serious consequences for the complainant's livelihood.

Likewise, it is quite evident that the gravity of the accusation exceeded the complainant's personal interest, because the statement cast doubt upon the community of journalists as a professional group. Again, one can not overlook the context in which the statement was made, or the fact that it was meant to serve only as an example of a widespread phenomenon - corruption among journalists. Of course, creating an image of corrupt media has a devastating effect on relationships in a civil society, because individuals are generally completely reliant on information from the media in forming their opinions and subsequently projecting them into their daily decision making. However, the High Court did not consider the gravity of the accusation made by the secondary party in this context at all.

Re 2) What was said under Re 1) is also connected to the evaluation of the nature of this statement and its evaluation in terms of the public interest. Its content - corruption among journalists, with the provision of one piece of so-called evidence - is undoubtedly a matter of public interest, for the reason stated above under Re 1). The number of media reports which reacted to the prime minister's statement also testifies to this.

Re 3) As regards the source of the information, the High Court relied on the determination that the secondary party did not have direct knowledge of the circumstances which were the content of his information. The High Court then relied on a completely unrealistic opinion, based on pre formalism, i.e. on the statement that if the secondary party was informed by a "statutory body," its information must be truthfully, and it concluded immaterially that it was not necessary to verify it further. In doing so it ignored the fact that ČEZ is an enormous company, and no general manager can be informed about everything that happens in it, and also that it is highly unlikely, even impossible, that he will be informed about events which are not directly connected to the company's business activities or even about events which preceded a particular person's presence in the position.

Primarily, however, the High Court did not at all evaluate the determined facts relating to the way in which the general manager of ČEZ gave the information to the secondary party, the prime minister. The undisputed part of the testimony of the general manager of ČEZ (p. 138) indicated that the prime minister asked the witness about the employment of journalists in an "antechamber" after a government meeting, around midnight, and the second meeting of the two men, which was said to last a few seconds, took place at an unspecified reception, where the general manager of ČEZ informed the prime minister,

erroneously, as was later shown, that he had cancelled the contract with the complainant.

The time, manner and place of giving the “information” undoubtedly affected its quality, in the sense of its precision and the resulting truthfulness. And in fact, the subsequent verification of the content of the statement by the really properly informed professional staff of ČEZ showed that it was untrue.

The Constitutional Court believes that information provided to the public by persons holding high constitutional office can not be based on a source in the form of oral statements in conditions which will evoke in any reasonable person at least a suspicion that the person providing the information might have, because of the time, place, or atmosphere, had the impression that this was not serious information, and adapted his degree of care accordingly. Likewise, one must take into account that the person providing information, like the person receiving it, might have been either exhausted after a long working session (the first meeting of the two men) or distracted by the social atmosphere of the event - a reception - in which he was taking part. The Constitutional Court is convinced that information provided by high constitutional officials, containing such explosive potential as in this case, should be seriously verified by their professional staff before it is disclosed publicly, which was evidently not done in this case.

The High Court also did not evaluate the secondary party’s statement in terms of the context of the political situation in the country, or from the point of view of the political agenda of the government, of which the secondary party was then prime minister. One of the main points of the then government’s political agenda was the fight against corruption. This publicly very beneficial agenda, however, also forms the context for this matter, and it must be evaluated in terms of evaluating the secondary party’s motivation for making his statement. Fulfilling the political agenda could undoubtedly have been a strong motive for providing the information. The context for evaluating the motive must also be formed by evaluation of the truthfulness of the secondary party’s statement, which had a similar content in relation to J. Z., as this statement is inseparably contextually tied to the statement being contested.

Re 4) In contrast to the High Court, for the reasons given under Re 3, the Constitutional Court considers the secondary party’s demonstrably expended effort to verify the truthfulness of his subsequent statement completely inadequate in view of the defamatory potential it contained. On the contrary, it considers the demonstrated effort to be inadequate in relation to the secondary party’s opportunities to verify the truthfulness of the information. At that time the secondary party could rely on the work of an enormous administrative apparatus which arranged or could arrange background materials for public appearances for him.

Re 5) The status of the information was explained under point III of this judgment, i.e. as conduct *ultra vires* in relation to the jurisdiction of the government of the CR. Exceeding the bounds of government jurisdiction, however, always has, and in this case had, serious consequences. Information provided by the prim minister is always given greater weight by

the citizens that information coming from other persons, including the media. A citizen of a democratic law-based state quite naturally expects truthful information from constitutional officials and also expects that constitutional officials will maintain absolute respect for individual persons who are members of the civil society.

This principle is also a starting point for the very idea of a democratic law-based state. The cited, rightfully expected respect of course completely rules out the defamation of individuals by the state power (which constitutional officials represent). Therefore, the representatives of state authority are required to make public only thoroughly verified information which, in addition, relates only to matters which fall under their areas of jurisdiction. If a constitutional official has not had his claims of fact thoroughly verified as to their truthfulness, he is not entitled to make them public. These starting points apply all the more so in the case of claiming facts which threaten to defame individual persons, even if these persons are active in public affairs.

No state which is to be considered democratic and law-based can function without meeting this fundamental requirement. Defamation of individuals by representatives of state power and the resulting misinformation of all members of society is, in contrast, a technique well-known to totalitarian regimes. Therefore, our experience from the period before 1989 also dictates that it is necessary to insist quite firmly on the observance of the above-mentioned principles, which the High Court overlooked.

Re 6) Evaluation of the urgency of the information provided by the secondary party must be performed in the context of the considerations set forth above, especially those contained under Re 4 and 5.

Re 7) The High Court did not even pose the question whether the secondary party asked the complainant for comments on his intended statement, and therefore, of course, it did not consider this aspect. Although it can be conceded that the secondary party did not have to ask for the complainant's comments, this would apply only if he had verified the truthfulness of the intended statement in the ways indicated above. The same applies for the evaluation of the High Court from the point of view of point 8 of the test cited above.

Re 9) The tone of the secondary party's first contested statement was that of an announcement. In addition, the secondary party introduced his claim with the sentence: "Since you constantly want some concrete evidence of corruption among journalists, let me give you some." His statement contains not even a suggestion of doubts, which could be interpreted as an invitation for subsequent discussion about the alleged corruption among journalists. However, for reasons given under Re 5), it can not be conceded that a person holding constitutional office would be permitted, even by posing rhetorical questions, to initiate discussion to the detriment of the honor and reputation of a private person. Such an action, and only with a large dose of caution, can be permitted, under certain circumstances, with, for example, investigative journalism. However, the position of prime minister is not comparable with the purpose of the activities of an investigative journalist.

Re 10) The High Court did not consider the circumstances under which the first contested statement was made at all in the sense set forth above (in particular under Re 3 and 5), and for that reason too its conclusions must be considered defective.

At the close of the tested first statement by the secondary party the Constitutional Court says, borrowing the words of a writer who penetrates deep under the surface of events and things, that the general courts which will decide the matter again should bear in mind that even the ground of mere determination of facts is muddy and slippery and it is difficult to stand on it. Even a fact is not something clear and unprejudiced (Salman Rushdie, essay "When The Prisoner Is the Facts," Mladá Fronta Dnes, 25 June 2005, p. E-II).

As regards evaluation of the High Court's decision relating to the secondary party's claim made on 30 June 1999 on ČT, 3 July 1999 on Radiožurnál, and 16 July 1999 at a press conference in Lidový dům, to this extent it is a non-reviewable decision, because it is given practically no justification, or only a general one, without individual statements being analyzed, although they differ from the statement which the secondary party made on 29 June 1999, i.e. from the first statement, and moreover were made in a considerably different situation than the first statement.

In the case of the second statement, it will thus be necessary to evaluate especially the fact that the secondary party completely neglected to reproduce the explanatory apology from the general manager of ČEZ, published together with a statement from the press secretary of ČEZ, which he mentioned, and likewise neglected to deal with the published statement by the complainant himself. If the secondary party had honestly mentioned all these statements, he could not have continued to pose rhetorical questions, in which the Constitutional Court can not find any purpose other than continuing to cast doubt on the complainant's honor and good reputation.

In the third case, the secondary party added to the description of the genesis of his accusation relating to the claimant information about the content of the program "Nahraně" aired by ČT on 22 March 1999. This information is also a claim of fact which, however, as the file indicates, was not true. The secondary party stated that an environmental activist accused the complainant of writing articles favoring nuclear energy for ČEZ, for payment from ČEZ. However, as the Constitutional Court determined from the file, the environmental activist J. Beránek only said that ČEZ was printing the complainant's articles as paid advertising. This untrue claim of fact set forth by the secondary party in connection with the original statement by the general manager of ČEZ, which had been quite reliably refuted by that time, i.e. after his apology, which was well known to the secondary party, in and of itself represents considerable interference in the complainant's honor and reputation. It also testifies to the fact that the secondary party quite incomprehensibly refused to take cognizance of the explanation and apology by the general manager of ČEZ, as he began to perform a kind of quasi-analysis of the steps taken by the general manager of ČEZ, in the conclusion of which, without any kind of substantiation, he cast doubt on the truthfulness of the apology, and on the contrary, worked only with his original, untrue information. A question arises which will have to be

considered, whether, on the contrary, by adding untrue information on the content of the program “Nahraně” was not intended to compensate for the objectively weakening ring of the original information provided by the secondary party on the basis of the original untrue information from the general manager of ČEZ. Again, the High Court did not ask this question, although answering it was essential for evaluating the third statement comprehensively and in the context in which it was made.

As regards the fourth statement, the secondary party repeated the untruthful claim about the content of the television program “Nahraně” and repeated his version of the course of events, and then described everything as “completely clear arguments,” on which he relied. All this was in response to the complainant’s question whether there was evidence of his corruption. This time he completely omitted any mention of the denial provided by ČEZ, the apology by its general manager, as well as the complainant’s own statement. These circumstances too remained outside the attention and evaluation of the High Court.

In evaluating the secondary party’s expression made in the first statement that he considers the conduct he described to be a form of corruption, the Constitutional Court states that one can agree with the High Court to the extent that this was an expression of an opinion, the truthfulness of which fundamentally can not be verified. However, it can not be overlooked that this was an expression of a particular kind of opinion, i.e. a legal opinion. The proportionality of the expressed opinion can be reviewed, in fact it must be tested, but the High Court did not even try to conduct such a test. Yet it is evident that even when evaluating the proportionality of an expressed legal opinion the then official position of the secondary party must be taken into consideration.

Errors in the legal evaluation of the complainant’s alleged conduct are scarcely tolerable in the case of the secondary party. There were several lawyers in the government of which he was prime minister at that time; he had an opportunity, even an obligation, to discuss the matter with them, regardless of any desirable or even required consultations with the professional staff of the office of the government. In other words, the heightened requirements for the proportionality of the secondary party’s statement again develop from his then official position, and they can not be subject to parameters applied, for example, to the media, where a certain degree of imprecision in the legal evaluation of actions by persons on whom they report can be tolerated, though even in that case the tolerance can not be unlimited. However, the general courts did not determine whether the secondary party had any consultations with legal experts regarding the legal classification of the complainant’s alleged conduct.

For all the above-mentioned reasons, and weight the importance of freedom of expression on one side, and the importance of the honor and reputation of persons on the other side, the Constitutional Court must state that the High Court’s verdict completely ignored the importance of the latter value, which led to flagrant interference in the complainant’s subjective right, the fundamental right to protection of honor and good reputation, which is guaranteed by Art. 10 par. 1 of the Charter.

The secondary party's statement did not hold up under the test conducted by the Constitutional Court; therefore, neither did the decision of the High Court, which approved it, both in terms of evaluating the truthfulness of the contested statements as regards the facts claimed, and as regards the proportionality of the opinion expressed. The High Court did not provide protection for the claimant's honor and good reputation, and, surprisingly for the Constitutional Court, provided protection to the secondary party's fundamental right to freedom of expression, although in the instant case that right was exercised in conflict with a number of principles whose observance is a condition for protecting that right.

As regards evaluation of the decision of the Supreme Court of the CR, which denied the claimant's appeal on a point of law, that decision continued the interference in the claimant's fundamental rights. The Constitutional Court considers it necessary to point out that it does not understand the reasoning of that decision, which is composed of quotations from judicial case law primarily from the 1980s, and is more reminiscent of a post-modernist collage open to many interpretations than the reasoning of a court decision in the sense of evaluating a particular case in light of constitutional values and principles, interpreted in the context of contemporary European case law on analogous matters. It is evident from such case law how the approaches by individual European states in interpreting the principles applied to resolving conflicts between the right to freedom of expression and the right to honor and a good reputation approach each other. Because the Supreme Court of the CR did not meet the above-mentioned requirements, it was also necessary to annul its decision.

In view of the foregoing, the Constitutional Court granted the constitutional complaint under § 82 par. 2 let. a) in connection with par. 3 let. a) of the Act on the Constitutional Court, and annulled the contested decisions, because it found that the decision of the High Court in Prague and of the Supreme Court of the CR violate the complainant's fundamental right guaranteed by Art. 10 par. 1 of the Charter.

Notice: Decisions of the Constitutional Court can not be appealed

Brno 11 November 2005

Dissenting Opinion

of judge Michaela Židlická

I do not agree with the verdicts of the judgment; Nevertheless, I consider it beneficial to address in this form a question which I consider fundamental and which was not given attention in the reasoning of the decision.

In the instant case, the substance of the problem was the legal opinion of the High Court in Prague that the information made public by the secondary party, Ing. M. Z., was truthful, and therefore not capable of causing unjustified interference in the complainant's personal rights. The High Court concluded that the secondary party, by identifying the source of the information, only truthfully reproduced the content of his conversation with Ing. Č.; this was not affected at all by the fact that the information provided by Ing. Č. was shown to be untrue. Of course, such an interpretation is unacceptable from a constitutional viewpoint, because it gives priority to formal logic over the realistic meaning of the communication, as it is understood by the hearers, and it overlooks the possible negative effects of such conduct on the sphere of the complainant's personality.

The secondary party's statement, leaving aside his evaluative judgments, can be considered truthful in terms of logic; nonetheless, we can not overlook that it completely lacks completeness, which is decisive for evaluating the truthfulness of information in its material sense. An erroneous impression was created among the recipients of the information mediated by the secondary party that the information provided to the secondary party by Ing. Č., was also truthful, because the secondary party's statement did not contain even a suggestion that this need not be the case. It is completely non-decisive whether the secondary party should or could have verified the actual situation, because liability for unjustified interference in personal rights is strict liability, which does not require causation in any form.

There is not the slightest doubt that the entire incident could negatively affect the complainant's personal sphere. For that reason too the High Court's interpretation can not be accepted, because this would result in a situation where the person who made the statement would not be responsible for real interference in the complainant's personality rights, nor would the person who provided the initiative for it, because his communication was not public, and therefore it would obviously not be possible to conclude a causal connection between the conduct of the person communicating the information and the subsequent interference in personality rights.

Fundamental rights and freedoms may be limited if they conflict, even if the constitutional framework does not expect such limitation. In these situations it is necessary to set forth conditions under which one fundamental right or freedom has priority, and conditions under which the other has priority. In this regard there is a fundamental maxim that a fundamental right or freedom may be limited only in the interest of another fundamental right or freedom (Constitutional Court judgment of 17 February 1999, file no. Pl. US 16/98, published in the Collection of Laws as no. 68/1999 Coll.). In the event of balancing two

fundamental rights and freedoms it is always necessary, in view of Art. 4 par. 4 of the Charter of Fundamental Rights and Freedoms, to preserve the essence and significance of the right which is to cede to another right. The interpretation of the High Court in Prague does not meet this fundamental condition, because it provides protection for the expression of the secondary party, while ignoring the true significance of his communication, and permits the complainant to be denied an opportunity to defend himself against actually existing interference in his fundamental right to protection of his honor and good name under Art. 10 of the Charter of Fundamental Rights and Freedoms. For that reason I voted to annul the contested decision of the High Court in Prague, as well as that of the Supreme Court of the Czech Republic, which did not recognize the foregoing lack of constitutionality.

Brno 11 November 2005