On the Constitutionality of the Punishment of Scaremongering in the Hungarian Legal System

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Abstract

Scaremongering criminalized as a limitation to freedom of speech in Hungarian law. In lack of relevant case-law, free speech commentators rarely discussed the provision until the Government took action to step up the fight against the COVID-19 pandemic, and the ensuing amendment of the Criminal Code in Spring 2020 brought the subject back to the forefront of public debate. The article analyses the constitutional issues related to the criminalization of scaremongering, taking the two available Constitutional Court decisions rendered in this subject as guideline. Though the newly introduced legislation attracted widespread criticism in Hungary and elsewhere in Europe, a thorough examination of the new statutory elements makes it clear that public debate and critical opinions may not be stifled by prosecuting individuals for scaremongering. Although the applicable standard cannot yet be determined with full accuracy, the Constitutional Court's decisions and relevant academic analysis resolve the main issues in order to protect freedom of expression, while the clarification of further details remains a matter for the case-law.

Keywords: scaremongering, clear and present danger, COVID-19 pandemic, freedom of expression, Constitutional Court of Hungary.

1. Introduction: On the Protection of Untrue Statements

The issue of false allegations, including the possibility of prohibiting deliberate lies or their inclusion under the scope of freedom of expression, is one which concerns European, and among them the Hungarian legal system. Nevertheless, it can be stated with some certainty that lies cannot be prohibited in a general sense, given the widespread constitutional protection of freedom of expression. It is possible to take legal action against untruths if they violate certain specific statutory provisions, such as those governing the protection of reputation,[1] or

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1 Section 2:45(2) of the Civil Code (in this article I refer to only Hungarian pieces of legislation).

false allegations made during the election campaign that disregard the requirements of good faith and the proper exercise of rights,[2] or rules on the scope of misleading commercial practices,[3] and finally, provisions in connection with the denial of genocides (primarily, the Holocaust).[4] Scaremongering is another activity which may be prohibited, *i.e.* if the relevant criminal law statutory elements exist: a false statement may be punishable. The individual statutory elements of the crime have been interpreted by established case-law related to other crimes, but in the absence of significant case-law regarding scaremongering itself, these statutory elements, altogether avoided the scrutiny of analysts of freedom of expression. With the Hungarian Government's actions to control the COVID-19 pandemic and the resulting amendment to the Criminal Code in the spring of 2020 the issues related to statutory regulation of scaremongering came under the public eye. This article will discuss the constitutional issues related to the prohibition of scaremongering in light of the two decisions of the Hungarian Constitutional Court delivered on this subject.

2. A Brief Overview of the Ban on Scaremongering in the Hungarian Legal System

The first Hungarian Criminal Code, the so-called *Csemegi Code* of 1878, was supplemented by Act XL of 1879 on Petty Offences, Article 40 of which regulated "scaremongering" as follows:

> "Whoever, by setting off bells or any other alarm, knowing that there is no cause, disturbs the peace of the inhabitants; or who intentionally misleads the authority by reporting false news of distress or riot shall be punished by imprisonment for up to eight days. And if, as a result of reporting a false rumor, the police or the armed forces are called out: the perpetrator shall be punished by imprisonment for up to fifteen days."

Article 80 of Act III of 1930 on the Entry into Force of the Military Criminal Code and on the Amendment and Supplementation of Certain Provisions of the Ordinary Criminal Code prescribed capital punishment for anyone who "fabricates or spreads false news in war-time or in connection with warfare." Section 68 of the same Act set forth a serious penalty for any person who communicated a false or forged document or drawing or other untrue document, which, if authentic would be a state secret, to a foreign state authority, foreign organization or their agent, if the communication is capable of compromising the military or other important interests of the state. The model of this regulation

2 Section 2(1) of Act XXXVI of 2013 on Electoral Procedure (obligation to exercise rights in good faith and for their intended purpose).

3 Sections 6 and 7 of Act XLVII of 2008 on the Prohibition of Unfair Commercial Practices against Consumers.

4 Section 333 of the Criminal Code.

doi: 10.5553/HYIEL/266627012021009001002

was German legislation, dating from 1927.[5] This provision foresaw punishment for deception by using a non-existent state secret. Act X of 1937, on the other hand, set out the general statutory elements of scaremongering, on the basis of which the offence is committed by "fabricating news or spreading untrue news that may disturb public order or peace of mind or endanger the country's foreign policy or adversely affect its economic situation or its lending practice."

After World War II, it was Decree No. 8800/1946. (VII. 28.) of the Prime Minister on the criminal protection of the economic order that regulated scaremongering, followed by general statutory elements on the dissemination of economic rumors, set out in Section 26 of Act XXXIV of 1947 on certain provisions relating to the people's justice:

> "in the presence of two or more persons, [to] state or spread rumors of any untrue fact or allegation that is capable of disturbing public order or public peace, or endangering the country's foreign policy interests or adversely affecting the economic situation."

The latter Act prescribed punishment for scaremongering primarily for the reason that it was capable of disturbing the public peace and endangering certain named state interests.

Despite the new statutory elements, the comprehensive compendium of Criminal Substantive Law, the *'Hatályos Anyagi Büntetőjogi Szabályok Hivatalos Összeállítása'*, which in principle contained the full body of legislation in force on 31 August 1951, also uphold the above-mentioned statutory elements of 1930 and 1937. Finally, the Criminal Code of 1961 brought order into the overlapping rules; Section 218(1) of which re-regulated scaremongering:

> "Whoever claims or spreads rumors, in front of others, of a false fact or fact distorted in such a way as to disturb the public peace or adversely affect the economic situation shall be punished by imprisonment for a term not exceeding two years."

Section 270(1) of the Criminal Code of 1978 only penalized scaremongering that was capable of disturbing the public peace, and Paragraph (2) of the code defined scaremongering committed in a place of public danger or during war as an aggravated case. The statutory elements contained in the 1978 Criminal Code were amended by Act XXV of 1989 at the time of the transition from Communism to the rule of law, which established a requirement that the offence be committed before a large audience as a mandatory statutory element, narrowing thereby the scope of the punishable acts:

> "270(1) A person who, before a large audience, states or disseminates any untrue fact or any misrepresented true fact that is capable of causing

5 Gyula Isaák, 'Az államtitok büntetőjogi védelméhez', *Magyar Jogi Szemle*, 1931/2, p. 58.

> disturbance is guilty of a misdemeanor and shall be punished by imprisonment for up to one year, community service or a fine.
>
> (2) The punishment shall be imprisonment for a term not exceeding three years for a criminal offence if the scaremongering is committed in a place of public danger or during a war."

The statutory elements of scaremongering were already free of ideologized content by then, so no major changes had to made to the provision at the time of the democratic transition.[6]

3. The Constitutionality of the Prohibition of Scaremongering: *Decision No. 18/2000. (VI. 6.) AB*

The constitutionality of the prohibition set forth in Section 270 of the Criminal Code was considered in *Decision No. 18/2000. (VI. 6.) AB*, which annulled the provision in its entirety. The decision (by then based on several years of Constitutional Court's case-law on free expression) established the constitutional significance of freely-formed public opinion:

> "the expression of individual opinion, public opinion formed in accordance with its own laws, and the possibility of individual opinion-forming based on the widest possible information in interaction with them are what enjoy constitutional protection."[7]

In assessing the constitutionality of the statutory elements of scaremongering, the decision recalled the Constitutional Court's 1992 decision regarding the statutory elements of hate speech; more precisely, 'incitement to hatred against a community', enshrined in the Criminal Code. The cited decision, *Decision No. 30/1992. (V. 26.) AB* is one of the early and most influential decisions of the Constitutional Court related to the freedom of speech, which has been frequently referred to ever since and whose exact interpretation has been disputed since its adoption.

According to the relevant part of the reasoning of *Decision No. 18/2000. (VI. 6.) AB*,

> "[w]ith regard to 'incitement to hatred' the Constitutional Court has recognized the restriction of the freedom of expression as constitutional, the protected legal object of which is also the public peace, following from its location in the Criminal Code. According to the Constitutional Court, behind such a disturbance of public peace, there is also a danger of violating a large

6 For more information on the history of the scaremongering, *see* Szabolcs Hornyák, *A köznyugalom elleni bűncselekmények*, doctoral dissertation, PTE, Pécs, 2010, pp. 37-42, 47-48, and 154-157.

7 Decision No. 18/2000. (VI. 6.) AB, Reasoning III/2., ABH 2000, 117, 121.

doi: 10.5553/HYIEL/266627012021009001002

> number of individual rights: the violence against the group threatens the honor and dignity (in extreme cases, life) of those belonging to the group, and restricts them from exercising other rights (including free expression) by intimidation. Incitement to hatred also poses a threat to individual rights that give such weight to the public peace as its direct object that a restriction on freedom of expression is considered necessary and proportionate. Although the practical result of the deliberations is similar, this line of reasoning is not just about the intensity of the disturbance of public peace (clear and present danger), which justifies a restriction on the right to the freedom of expression if it exceeds a certain level. What is decisive here is that which has been endangered: incitement also endangers the rights of individuals, which are very highly positioned in the constitutional order of values."[8]

The above text, from the sentence beginning with "Although…", is a literal quote from the statement of reasons for *Decision No. 30/1992. (V. 26.) AB*, which was also included in the statement of reasons for *Decision No. 18/2000. (VI. 6.) AB*. The reasoning of *Decision No. 30/1992. (V. 26.) AB* seeks to separate the public peace and individual rights, which are both protected legal objects as set out in the criminal offence. The logic of the reasoning is based on the fact that public peace is not a specific right or interest that can, in general, justify a restriction of the freedom of expression. Such a restriction is only constitutional if the intensity of the disturbance of the public peace reaches the level of a *clear and present danger*; that is, there is a manifest and imminent danger to the public peace.

In my opinion, the text of the statement of reasons for *Decision No. 30/1992. (V. 26.) AB* quoted means, if interpreted correctly, that while the protection of the public peace provides a constitutional basis for restricting the freedom of speech only *if the risk of its violation is manifest and imminent, the standards for restricting freedom of speech may be lower in the case of individual rights*. Nevertheless, their endangerment is a condition for the commission of a criminal offence. The nature of this danger, however, and the extent to which it is punishable remains an open question.

In any case, in the application of the law, when assessing a specific real-life situation (incitement against a community before a large audience), it is not possible to separate acts that violate or endanger the public peace and those which threaten individual rights from each other. The endangerment of individual rights also entails the endangerment of the public peace and, conversely, the public peace may be endangered in such a way that the exercise of the freedom of expression threatens individual rights. In other words, the protection of the public peace and the protection of individual rights are inseparable, which also means that it is unnecessary to apply a different standard in practice for these two protected legal objects. This is because, due to their inseparability, the lower of the two rather restrictive standards, *i.e.* the one that

8 Id. III.3.3., ABH 2000, 117, 127.

allows for the restriction of freedom of speech to a greater extent, should be applied to establish whether a criminal offence has been committed. Individual rights (because they are specific) may be constitutionally defended from violation arising from an expressed opinion by using a lower standard. Therefore, the standard of clear and present danger to the public peace which a violation would have to meet (if it were, in itself, the protected legal object of the criminal offence) for the Constitutional Court to consider it as worthy of protection is immaterial. The latter should therefore not be taken into account in the application of the law.

It is worth considering the relevant sentence from *Decision No. 30/1992. (V. 26.) AB*:

> "[t]he conduct sanctioned in Paragraph (1) also constitutes a threat to individual rights, which gives such weight to the public peace as the direct object that […] a restriction on the freedom of expression is considered necessary and proportionate."

This sentence also underlines the close connection and inseparability of the public peace and individual rights. According to the text, the threat to individual rights affects the public peace ("giving it weight", *i.e.* justifying its protection); and as such the two protected legal objects are inseparable. The quote continues thus:

> "[a]lthough the practical result of the deliberations is similar, this line of reasoning is not merely about the intensity of the disturbance of the public peace, which justifies a restriction on the right to the freedom of expression above a certain degree (clear and present danger). What is decisive here is what has been endangered: incitement also endangers the rights of individuals, which are very highly positioned in the constitutional order of values."[9]

This can be interpreted as follows: *if there is 'merely' a disturbance of the public peace then clear and present danger should be used to restrict the freedom of expression*. However, this is not enough: *decisive is that subjective (individual) rights are also in danger (but not necessarily in clear and present danger)*. Thus, an independent examination of the danger to the public peace is unnecessary, and the sentence in which the clear and present danger doctrine is mentioned does not help establish an applicable standard of 'incitement to hatred'.

The scholars interpreting the statement of reasons of the 1992 decision may be divided into three groups. The first includes authors who see it as an application of the US' clear and present danger standard[10] on the basis of which incitement to hatred may only be punished if there is a manifest and imminent

9 Decision No. 30/1992. (V. 26.) AB, Reasoning V.2., ABH 1992, 167, 179.

10 For more information on this standard, *see* András Koltay, *Freedom of Speech – A Mirage out of Reach*, Wolters Kluwer, Budapest, 2013, pp. 127-132.

doi: 10.5553/HYIEL/266627012021009001002

danger caused by speech of acts of violence against the community concerned.[11] The inception of the *clear and present danger doctrine* may be attributed essentially to two US Supreme Court Justices, Oliver Wendell Holmes and Louis D. Brandeis. It first appeared in *Schenk v United States*,[12] drafted by Holmes:

> "The question in each case is whether the words used were disclosed in circumstances and were of such a nature as to create a manifest and imminent danger of significant harm, which the Congress is entitled to prevent."

Later, Holmes expressed the view, in the dissenting opinion attached to the *Abrams v United States* judgment,[13] that although stricter restrictions on freedom of expression were permissible in certain cases in conditions of war, the directness of the danger posed by communication was the standard requirement in all cases. The new formulation of the clear and present danger doctrine, which is still valid today, was made in 1969 in *Brandenburg v Ohio*.[14] According to the new test set out in the statement of reasons, communications that call for violence or other offences may only be restricted if they are specifically aimed at inciting imminent violence or law-breaking, expressly call for it and this is likely to occur. The original test was thus thoroughly narrowed down to a new standard, called the *Brandenburg* test: in addition to the likelihood of danger, the intention to cause a breach of the law and an express call for an infringement are also required for the restriction of speech. (It should also be noted that the imminent danger concept used in Hungarian criminal dogmatics cannot be definitively equated with the US clear and present danger, given that in the legal literature the Hungarian version of the latter is generally referred to as a "manifest and imminent danger". Nevertheless, we shall disregard these differences for the sake of simplicity, as it does not interfere with the process of finding a constitutional standard.)

In the other group are those who believe that although the Constitutional Court did not introduce the US standard mentioned, in order for "incitement to hatred" to take place, *some kind of (real, actual, genuine, etc.) state of danger must*

11 Gábor Halmai, '"Az előző vizsgálat eltöröltetvén örökre…"?', *Fundamentum*, 1997/1, p. 63; Gábor Halmai, 'Hátramenetben az alapjogvédelem?', *Fundamentum*, 2000/3, p. 69. *See also* Gábor Halmai, '"Gyűlöletbeszéd" és uniós csatlakozás', *Fundamentum*, 2003/2, p. 112; Gábor Halmai, 'Túl kevés és túl sok szólásszabadság – egy utilitarista megközelítés', *Fundamentum*, 2005/3, p. 190; Péter Molnár, 'Uszítás vagy gyalázkodás?', *Fundamentum*, 2001/4, p. 114; Péter Molnár, 'Az alkotmányos mérce világosabb értelmezése felé', *Fundamentum*, 2004/1, p. 144; János Kis, 'A szólásszabadság próbája', *Magyar Narancs*, 7 February 2002. *See* confirmation in János Kis, 'A bírói döntéstől a törvény fölötti döntésig', *Élet és Irodalom*, 2003/47; János Kis & László Sólyom, 'Az alkotmány és a szólásszabadság', *Népszabadság*, 11 October 2003.

12 249 U.S. 47 (1919).

13 250 U.S. 616 (1919).

14 395 U.S. 444 (1969).

arise in the wake of the opinion expressed.[15] The President of the Hungarian Republic, Ferenc Mádl, in his motion to the Constitutional Court, which served as the basis of *Decision No. 18/2004. (V. 25.) AB*, put it as follows:

> "[t]he Constitutional Court has not precisely defined the extent of the threat required for the restriction – although it referred to the famous US Supreme Court test of clear and present danger. In my interpretation, however, it is clear that although the Constitutional Court does not set, as a standard of constitutionality, that incitement to hatred is to cause a manifest and imminent danger, the threat to specific fundamental rights must however be realistic and genuine."[16]

The third group is comprised of traditionalist proponents of criminal law, who argue that *the objectivity of a communication to incite hatred is sufficient for the statutory elements* to exist and that its effect need not be assessed in order to establish criminal liability.[17]

When interpreting *Decision No. 18/2000. (VI. 6.) AB*, the question is not just what the reference in the 1992 decision to clear and present danger means, but, regardless of what it means, what its role is in the constitutional review of the statutory elements of scaremongering. The statement of reasons does not provide a definitive answer to this question. Recalling the decision on incitement to hatred, it states:

> "As a result of the examination of the constitutionality of Section 270 of the Criminal Code, the Constitutional Court reached the same position in the case of scaremongering. The criminalization of conduct defined by the law is an unconstitutional restriction on the freedom of communication."[18]

But what is meant by "same position" here? As we have seen, there are at least three possible answers to this.

The statement of reasons no longer applies the clear and present danger (in Hungarian criminal law, manifest and imminent danger) test, but there is no doubt that, in order to establish the constitutionality of scaremongering, it expects special circumstances to prevail that would justify a serious violation of interests and a restriction on speech:

15 László Sólyom, *Az alkotmánybíráskodás kezdetei Magyarországon*. Osiris, Budapest, 2001, pp. 477-478; László Sólyom, 'Szeretetbeszéd, tiszteletbeszéd', *Népszabadság*, 24 December 2001; Bernát Török, 'A gyűlöletbeszéd tilalmának médiajogi mércéi', *Jogtudományi Közlöny*, Vol. 68, Issue 2, 2013, p. 67.

16 'A gyűlöletbeszéd büntethetősége. Motion of the President of the Republic to the Constitutional Court', *Fundamentum*, 2004/1, p. 132.

17 Gyula Szeder, 'A társadalom békéjének büntetőjogi védelméről', *Magyar Jog*, 2002/1, p. 7; Ervin Belovics *et al*., *Büntetőjog. Különös rész*. HVG-ORAC, Budapest, 2001, p. 331; Endre Bócz & Kálmán Györgyi, 'Hol az alkotmányosság határa?', *Népszabadság*, 30 October 2003; András Szabó, 'Eső után köpönyeg?', *Népszabadság*, 6 November 2003; Gergely Bárándy, *A gyűlöletbeszéd Magyarországon*, Scolar, Budapest, 2009, p. 84.

18 Decision No. 18/2000. (VI. 6.) AB, Reasoning III/4., ABH 2000, 117, 130.

doi: 10.5553/HYIEL/266627012021009001002

> "It follows from the high value of [the] fundamental constitutional right to the freedom of expression that the damage to the interests on which the restriction is based must be particularly serious."[19]

The assertion of untrue facts cannot in itself be prohibited, even if it is objectively capable of disturbing the public peace:

> "The assertion or rumor of untrue facts, or the distortion of facts, even if the person asserting the fact is aware of the detrimental effect of his act on the public peace accepts it, or even so desires it, is within the realm of freedom of expression not limited by criminal law."[20]

Although, of the statutory elements examined, the one in Paragraph (1) is unconstitutional, this does not mean that scaremongering could not be prohibited more narrowly than by the statutory elements which were annulled.

> "At the same time, the Constitutional Court has ruled that the Constitution does not preclude the legislature from using criminal law in certain cases to protect the public peace against scaremongering. As it follows from Section 8(4) of the Constitution, it is possible to suspend or restrict freedom of expression during a state of national crisis, state of emergency or state of danger."[21]

Furthermore:

> "[N]o constitutional obstacle exists to prevent the legislature from prescribing the punishment of knowingly false allegations (rumors, distortions of facts) made before a large audience, if committed in a state of danger, *e.g.* committed in a place of public danger or in time of war and which may lead to disturbances in the public peace."[22]

The Constitutional Court did not find the other statutory elements specified in Paragraph (2) to be unconstitutional *per se*. However, in view of the fact that the elements of the legal statutory elements of scaremongering had already been set out in Section 270(1) of the Criminal Code, [Paragraph (2) merely referred back to them and used the term 'scaremongering'], and due to the applied codification technique, the Constitutional Court also annulled Section 270(2) of the Criminal Code.

In a later part of the statement of reasons, the Constitutional Court referred to *"a realistic possibility of disturbing the public peace" as a condition for the criminality for scaremongering*. That is, it would be an unconstitutional restriction

19 Id.
20 Id.
21 Id.
22 Id.

if the legislator were satisfied with the objective capability of the communication to disturb the public peace, it is the real risk of disturbing the public peace that reaches the level of criminality:

> "Public peace is itself a precarious social phenomenon that requires interpretation, and the assessment of whether a statement of fact or rumor is indeed capable of disturbing the public peace explicitly provides an opportunity for possible and, where appropriate, arbitrary interpretation and application of the law. The condition for establishing criminal liability is, in principle, a realistic possibility of disturbing the public peace, but in certain specific cases it is for the criminal authorities, and ultimately the criminal court, to assess it as a conclusion drawn from the comparison of the content of the statement of facts, the perpetrator and the circumstances of the offence."[23]

Although, according to the Constitutional Court, the statutory elements allow such an interpretation, due to the lack of clarity, annulment was the only constitutional route:

> "[From S]ection 270 of the Criminal Code, judged in terms of the definiteness, accuracy and clarity required from the statutory elements in the Criminal Law, it may be concluded that, in deciding on criminal liability, those applying the law must take into account an impermissible number of circumstances from the point of view of constitutionality that are not formulated by the law but by the justification of the law, decisions in individual cases and legal commentaries. All this leaves too much room for error on the part of law enforcement, as some aspects may not be taken into account, even with the most careful consideration, but also for arbitrary selection (what is taken and not taken into account), reaching a level of legal uncertainty."[24]

The decision also lays down the *ultima ratio* nature of criminal law, which allows for penal intervention only in the most necessary cases.[25] The Constitutional Court put it very clearly:

> "In the system of legal liability, criminal law is the *ultima ratio*. It is its social purpose to be a sanctioning keystone for the legal system as a whole. Criminal sanctions and the role and purpose of punishment are to maintain the integrity of legal and moral norms when sanctions from other branches of law are no longer successful."[26]

23 Id. Reasoning III.5., ABH 2000, 117, 131.
24 Id.
25 Id. Reasoning III.4., ABH 2000, 117, 129.
26 Decision No. 30/1992. (V. 26.) AB, Reasoning IV.4., ABH 1992, 167, 176.

doi: 10.5553/HYIEL/266627012021009001002

At the same time, threatening behavior may be punishable, *i.e.* the protection of the freedom of expression does not require that criminal law only react to events that have already caused harm, *i.e.* scaremongering does not have to be a crime of strict liability.[27]

The place of the reasoning of the decision in the fabric of Constitutional Court jurisprudence depends on what we think about the standard of scaremongering set by it. If it is assumed that the standard is the same as that set by *Decision No. 30/1992. (V. 26.) AB* then the two decisions are in line, and it only needs to be clarified how the 1992 decision may be interpreted. According to Bernát Török, however, the reasoning of the 2000 decision differs from that of the 1992 decision. In his view, the decision on hate speech only required a manifest and imminent danger of criminality in connection with the disturbance of the public peace (but in the event of a violation of individual rights it considered a lesser effect sufficient), by contrast, the subsequent decision actually established *a Hungarian version of the clear and present danger standard* for scaremongering, with general validity.

> "The 1992 decision also indicates the nature of the stricter conditions: the risk of a breach of the public peace in this case must be manifest and imminent. The Constitutional Court applied this test later in *Decision No. 18/2000. (VI. 6.) AB*, when it considered the prohibition of scaremongering to be constitutional only at the scene of public danger or in times of war, in which cases there is undoubtedly an imminent and manifest danger of harm to the public peace. In other cases, a restriction on scaremongering cannot be considered an 'overriding social need', an 'overriding public interest' that would justify a criminal law prohibition. It is not about the Constitutional Court not recognizing the public peace as a constitutional value, but about the fact that its theoretical violation, independent from individual rights, does not constitute a 'particularly serious harm', essential for the criminal law restriction of the right to the freedom of expression. In that case, the standard of criminal law intervention must be set as high as possible, limiting official action to manifest and imminent states of danger."[28]

According to Török, therefore, *Decision No. 18/2000. (VI. 6.) AB* is the first decision in the case-law of the Constitutional Court that actually requires the existence of a manifest and imminent danger to establish criminality.[29] However, it is also possible to interpret the decision as meaning that it did not in fact apply the test of manifest and imminent (clear and present) danger itself. This

27 Decision No. 18/2000. (VI. 6.) AB, Reasoning III.5., ABH 2000, 117, 131.

28 Bernát Török, *Szabadon szólni, demokráciában*, HVG-ORAC, Budapest, 2018, pp. 100-101.

29 In connection with incitement to hatred, Decisions No. 18/2004. (V. 25.) AB and 95/2008. (VII. 3.) AB also applied this standard, choosing the first of the possible interpretations of Decision No. 30/1992. (V. 26.) AB, cited above. *See* for more András Koltay, 'A nagy magyar gyűlöletbeszéd-vita: a "gyűlöletre uszítás" alkotmányos mércéjének azonosítása felé', *Állam- és Jogtudomány*, Vol. 53, Issue 1-2, 2013, pp. 91-123.

interpretation is supported by the ambiguous reference to the statement of reasons of the 1992 decision and by the criterion of a "realistic possibility of disturbing the public peace" for establishing criminal liability, set out later in the text. In Török's view, there is no doubt that there is a manifest and imminent danger of harm to the public peace at the scene of public danger or in times of war. That is to say, the Constitutional Court narrowed the criminality of scaremongering to a period covered by the special legal order,[30] at the scene of public danger, thus implicitly stating that a manifest and imminent danger was also necessary. It may also be argued, however, that in principle, a situation is conceivable in which someone intentionally makes a false statement at the time of a special legal order or in a situation of war, but which is not capable of causing a manifest and imminent danger. In such cases, the occurrence of danger may be presumed, since it is easier to cause, yet it should not be accepted automatically. A diverging interpretation of the 2000 decision states that the 'realistic' occurrence of the danger is sufficient to allow law enforcement authorities to accept this kind of automatism, due to the causal link between speech and the danger it poses.

The statutory elements of scaremongering present in the old Criminal Code were re-codified by the legislator in Act CXXV of 2000. The new rule took into account the Constitutional Court's intentions and only penalized communications at a scene of public danger which could cause confusion or unrest in a larger group of people:

> "Section 270: A person who, at a site of public danger, states or disseminates any untrue fact or any misrepresented true fact that is capable of causing disturbance or unrest in a larger group of persons is guilty of a felony and shall be punished by imprisonment for up to three years."

According to the Criminal Code commentary, public danger should be understood as a situation:

> "When there is a realistic risk of damage to an unspecified or larger number of specified persons or material assets of significant value. The concept of a place of public danger also includes the actual place and time of the public danger, and here the conduct must be exerted before a large audience."[31]

According to the commentary, this public danger is caused by human behavior, rather than, for example, a natural disaster,[32] but this is at least an arguable interpretation. In my view, this interpretation may be due to the fact that the notion of public danger is mostly interpreted in the commentaries in relation to

30 In the Fundamental Law, these are: state of national crisis, state of emergency, state of preventive defence, state of terrorist threat, unexpected attack and state of danger (Articles 48-53 of the Fundamental Law).

31 Wolters Kluwer Commentary to the Criminal Code (explanation to Section 337 of the Criminal Code, which is essentially the same text as Section 270 of the old Criminal Code).

32 Id.

doi: 10.5553/HYIEL/266627012021009001002

the criminal offence of 'causing public danger', where the state of danger is manifestly caused by human behavior. This is also typical in practice, but it cannot be ruled out that, with regard to other crimes, public danger may also be caused by a natural phenomenon, the definition of which was left undetermined by criminal law, so in recent decades it has been shaped by case-law.

> "Although the law in force does not define the concept of public danger, it is settled case-law that a danger becomes a public danger if it threatens not only one or more (but in any event, a small number of) predetermined persons, but one or more unspecified or a larger number of specified persons."[33]

In addition, it can be considered a public danger if assets of significant value become endangered. An additional condition, in line with the decision of the Constitutional Court, is that the communication should be capable of causing confusion or anxiety in a larger group of people. The statutory elements are of an endangering nature; they are not concerned with the degree of danger (imminent or real), but the actual occurrence of the disturbance or unrest certainly does not have to be examined in criminal proceedings; the credible possibility of this is sufficient.[34]

The *statutory elements of scaremongering* set out in the Criminal Code (Act C of 2012) were supplemented by a single element clarifying the conditions of criminality: under Section 337, a false statement of facts must be capable of causing confusion or unrest in a larger group of people "at the site of public danger". The criminal offence may also be committed if the perpetrator is not personally present at the site of the public danger, but the communication of the rumor is perceived by those present (*e.g.* through the media).[35] No substantive case-law related to these statutory elements has been developed, and at the time of the writing the official database (the birosag.hu website) does not contain any decisions made in criminal proceedings initiated due to scaremongering.

4. Amendments to the Statutory Elements of Scaremongering and *Decision No. 15/2020. (VII. 8.) AB*

In the spring of 2020, following the adoption of the bill on the 'defense against the coronavirus', the Criminal Code was also amended, and a second scaremongering statutory element was introduced into the act:

> "Section 337(1): A person who, at a site of public danger and before a large audience, states or disseminates any untrue fact or any misrepresented true fact with regard to the public danger that is capable of causing disturbance or unrest in a larger group of persons at the site of public danger is guilty of a felony and shall be punished by imprisonment for up to three years.

33 BH 1970.8.6461.

34 István Ambrus, 'A koronavírus-járvány és a büntetőjog', *MTA Law Working Papers*, 2020/5, p. 13.

35 Id.

> (2) A person who, during the period of a special legal order and before a large audience, states or disseminates any untrue fact or any misrepresented true fact that is capable of hindering or preventing the efficiency of protection is guilty of a felony and shall be punished by imprisonment for one to five years."

The statement of reasons for the bill argued that the statutory elements in Paragraph (1), which are the same as the earlier elements, were not suitable for sanctioning scaremongering related to the pandemic, because they only allowed for action to be taken against communications made at the scene of a public danger. By contrast, "the state of danger declared during the coronavirus pandemic affects the entire country". It is therefore justified to enact the statutory elements set out in Paragraph (2) without any geographical restriction.

There was a fierce public debate about the bill. Critics of the new provision have most often criticized the disregard for the requirement of normative clarity.[36] By contrast, the Constitutional Court, in *Decision No. 15/2020. (VII. 8.) AB* found that when applying the law, each of the terms enshrined in the provision may be vested with a meaning that is in accordance with constitutional requirements.

> "In this case, with regard to the new statutory elements of the Criminal Code, there are insufficient grounds to conclude that certain definitions contained therein (fact, statement of fact, statement of untrue fact, distortion of fact, distinction of statement and rumor, special legal order, general public, *etc*.) are incomprehensible from the outset and therefore inapplicable. Other statutory elements in the Criminal Code contain elements identical or similar to them. The related case-law may provide a basis for judging what qualifies as scaremongering specified in Section 337(2) of the Criminal Code. The court of general jurisdiction may conclude that the subject of this criminal offence may not be the criticism of certain measures taken by the government during the special legal order, nor of forecasting future events, nor of speculating on data not disclosed in the context of the special legal order. It is also for the case-law to determine the manner of commission, *i.e*. the kind of act that is capable of "hindering or frustrating the effectiveness of defense". Neither the effectiveness of defense, nor the obstruction, nor the failure are an indecipherable statutory element to begin with. In respect of several statutory elements, the Criminal Code requires that the act be capable

36 László Bodolai, 'Rémhírek és vélemények', *Élet és Irodalom*, Vol. LXIV, Issue 13, 27 March 2020; Mátyás Bencze & Krisztina Ficsor, 'A koronavírus kihívásai és a jogtudomány: a rémhírterjesztés tényállásának jogalkalmazási kérdései', *TK JTI Blog*, 2 April 2020, at https://jog.tk.mta.hu/blog/2020/04/a-remhirterjesztes-tenyallasanak-jogalkalmazasi-kerdesei; *Még egyszer a koronavírus elleni védekezésről szóló törvénytervezetről (állásfoglalás)*, EKINT, 22 March 2020, at www.ekint.org/alkotmanyossag/2020-03-22/meg-egyszer-a-koronavirus-elleni-vedekezesrol-szolo-torvenytervezetrol-allasfoglalas; *Dermesztő hatással járhat a rémhírterjesztés tényállásának módosítása*, TASZ, 24 March 2020, at https://tasz.hu/cikkek/dermeszto-hatassal-jarhat-a-remhirterjesztes-tenyallasanak-modositasa.

doi: 10.5553/HYIEL/266627012021009001002

> of producing a consequence. This suitability indicates the objective effectiveness and direction of the act."[37]

Legal concepts may indeed be misleading if the interpreter starts from the general grammatical meaning of the words. Thus, for example, the expression 'untrue fact' may appear to be a contradiction in terms in the eyes of non-lawyers.[38] However, it is clear from the text of the Civil Code and from decades of case-law that *a statement of 'untrue fact' implies false statements purporting to be facts, i.e. the communication of untruths*.[39]

The decision analyses in detail the requirement of intentional conduct; in other words, *what exactly the offender's intention must be* when disclosing the untrue fact.

> "Scaremongering may only be committed intentionally. Consequently, the perpetrator must be aware that he is committing his act at a time of a special legal order; that the fact he alleges is untrue or has significantly distorted the true fact, and that the communication of his allegation is (objectively) capable of hindering or frustrating the effectiveness of defense. Furthermore, the intent of the perpetrator must include committing the above-mentioned conscious communication in front of a large audience. If his consciousness or intention does not extend to any of these elements, or if the allegation is not objectively capable of hindering or frustrating the effectiveness of the defense, the offence is not committed according to the rules of criminal law."[40]

The statement of reasons addresses the issues of the freedom of public debate in detail. According to the strongest criticisms of the new statutory elements, the aim of the regulation is to silence critical voices against government action. The statement of reasons thoroughly explores the differences between statements of fact and the restriction of opinions.

> "Section 337(2) of the Criminal Code [...] is not generally applicable to the content of public debates on the basis of criminal dogmatics. The measures of public authorities can be criticized and censored. The Criminal Code's rule restricts prohibited communication to (untrue) information that may hinder or frustrate the effectiveness of defense, during a special legal order. The same follows from the provisions of the Fundamental Law."[41]

> "Section 337(2) of the Criminal Code does not generally cover all published statements of fact related to the pandemic, which gave rise to its adoption.

37 Decision No. 15/2020. (VII. 8.) AB, Reasoning [43].

38 Krisztián Ungváry, 'Valós tény és a büntethetőség', *Index*, 25 March 2020, at https://index.hu/velemeny/2020/03/25/szolasszabadsag_remhirterjesztes_ungvary_krisztian.

39 Section 2:45(2) of the Civil Code, Violation of good reputation.

40 Decision No. 15/2020. (VII. 8.) AB, Reasoning [46].

41 Id. Reasoning [47].

> Nor shall it cover statements of fact that are disputed at the time of their communication or whose falsehood comes to light after their disclosure, where the perpetrator is not aware of their falsehood, since his conduct does not fully satisfy the statutory elements."[42]

> "The prohibition, then, applies only to knowingly untrue (or distorted) statements of fact, not to critical opinions. There is a well-established case-law that the latter should be included in the circle of protected opinions and, as epidemiology is currently one of our most important public affairs, the strictest protection should be given to public debates on this subject within the framework of legal norms affecting this subject."[43]

The prohibition set out in the statutory elements *applies only to false statements of fact, not to opinions; nor can any strong criticism of the actions of the government or any other public body be prohibited*. The statement of reasons also analyses the issue of the impact of scaremongering:

> "[S]ection 337(2) of the Criminal Code [...] prohibits the expression of an opinion based on knowingly false (or distorted) facts that, taking into account the place and time of the commission, and in particular the manner of its commission, may impede defense due to its effect on the audience. In this case, the restriction is set out in an act."[44]

> "The danger or harm that the restriction seeks to remedy in this case does not relate solely to the communication but to the effect of the communication. According to the guidelines of the General Prosecutor's Office, issued on 25 May 2020 with a view to ensuring the unity of law enforcement practice, the conduct specified in Section 337(2) of the Criminal Code is a statement or rumor of a false fact or a distorted assertion of a true fact that is capable of hindering or frustrating the effectiveness of defense. According to the guidelines, such conduct means the assertion or rumor of an untrue or distorted true fact that goes beyond the critique of each measure and is capable of triggering a human action, omission or related consequences, that may be contrary to epidemiological measures or other provisions laid down to prevent the spread of the pandemic or to prevent or eliminate its adverse effects."[45]

The prohibition only applies to a certain set of statements of fact. The range of (untrue) information that is capable of hindering the effectiveness of defense is relatively narrow; at least, it is much narrower than the range of all published statements of fact about the danger which justified the introduction of a special legal order. The prohibited act must be objectively capable of hindering or

42 Id. Reasoning [48].
43 Id. Reasoning [49].
44 Id. Reasoning [52].
45 Id. Reasoning [53].

doi: 10.5553/HYIEL/266627012021009001002

frustrating the effectiveness of defense, whether it is an act of government or of other state, municipal or even private effort.

However, this ability to cause harmful consequences, as required by the statement of reasons, may be a less strict standard than the manifest and imminent danger of such activities (clear and present danger). Although the 2020 decision does not refer to the 2000 decision, the relationship between the two may nevertheless be examined, on the basis of which the decisions may be in two kinds of relationship with each other. As this is the most sensitive issue, determining the standard of criminality, a lot is at stake when deciding which interpretation to follow.

Judging this issue essentially depends on whether we agree with Török. To be precise, if the mere fact that the rumor is communicated while under a special legal order also means that the communication poses a manifest and imminent danger then that must also be taken into account when applying the new 2020 statutory elements. All this would not represent a separate difficulty for the courts because, in Török's view, under the special legal order, communications meeting the statutory elements automatically pose a manifest and imminent danger. Thus, the two decisions, which are twenty years apart, may be considered compatible. There may also be consistency between them if we dispute Török's position and hold instead that the test of "real" rather than "manifest and imminent" danger may be read from the 2000 decision, as we may consider that, at the time of the special legal order, the real danger arises in itself when an act meeting the statutory elements is committed.

Of course, it is also possible to imagine an approach that does not seek to reconcile the two decisions. In this case, whatever the interpretation of the 2000 decision, we may consider the mere capability of causing harm as the standard in the 2020 decision (the capability of triggering a human action, omission or related consequences, which may be contrary to epidemiological measures or other provisions laid down to prevent the spread of the pandemic or to prevent or eliminate its adverse effects). This does not require the justification of any danger (either manifest and imminent nor real) for criminality to be found but links it only to the standard of objective capability.

In any case, *the silence of the 2020 decision on the criterion of danger* does not allow us to definitively determine which of the above possible options is the right choice, so the decision rests with the law enforcement in this regard, too. At the same time, it may be stated with general validity that scaremongering may only be constitutionally restricted by means of criminal law in very narrow cases since each possible interpretation sets a high standard for speech to be punished.

As an aid to law enforcement, the decision lays down a constitutional requirement for a range of relevant statutory elements and strengthens the protection of the freedom of expression. This is the case, for instance, where the veracity of the statement of fact in the communication cannot yet be established at the time of the communication but may later turn out to be false. The criterion of willful conduct already answers this question quite adequately, but the

constitutional requirement leaves no doubt as to the correctness of *the interpretation in favor of the freedom of expression*.[46]

> "The motion assumes that the challenged provisions of the Criminal Code may be interpreted (from a grammatical point of view) and applied in such a way as to cover cases within public debate, in which the act is a communication where its capability to hinder or frustrate protection is not expected to be definite but doubtful."[47]

> "When the criminal offence is committed, falsehood in the subjective sense is also relevant; that is, whether the perpetrator was aware of the falsehood himself. This is examined by criminal law within the framework of guilt. Because it is an intentional criminal offence, criminal liability may only be established if the perpetrator has been shown to be aware of the untruthfulness (distortion) of the statement of facts. it is the perpetrator's consciousness at the time of his act that is relevant from the perspective of criminal prosecution. Communication of facts disputed at the time of the commission (meaning that the perpetrator was aware of neither their falsehood, nor their veracity at that time), and only proved to be false later cannot be included under the scope of Section 337(2) of the Criminal Code."[48]

However, the Constitutional Court still considered it necessary to confirm its interpretation in the form of a constitutional requirement:

> "[T]he Constitutional Court, acting *ex officio*, finds that, in the interpretation and application of Section 337(2) of Act C of 2012 on the Criminal Code, under Articles IX(1) and XXVIII(1) of the Fundamental Law, it is a constitutional requirement that only the communication of a fact of which the perpetrator should have known at the time the act was committed that it was false or which he himself distorted and which is capable of obstructing or frustrating protection at the time of the special legal order is threatened by punishment."[49]

It is important to point out that *the Constitutional Court did not impose any new requirement that would deviate from the well-established application of criminal law in judicial practice*. Following the entry into force of these statutory elements, the police initiated proceedings in several cases on the grounds of speech having

46 However, according to the correct legal interpretation, a statement of fact may only concern a "phenomenon that existed in the past or exists in the present", *cf*. Hornyák 2010, p. 157.

47 Decision No. 15/2020. (VII. 8.) AB, Reasoning [55], 2.

48 Id. Reasoning [58].

49 Id. Operative part, 1.

doi: 10.5553/HYIEL/266627012021009001002

threatened public danger, in addition to scaremongering.[50] According to information from the National Police Headquarters, by 15 May 2020, the police had initiated 90 proceedings for scaremongering, of which 61 were closed by 10 June while two had reached a motion for indictment, according to information provided to the daily *Népszava*.[51] In some cases, a substantive decision will presumably be delivered, such as in a case which was brought in the city of Pécs.[52] The Pécs District Court reprimanded the accused person for the criminal offence of scaremongering. The accused had posted comments on social media that denied the existence of the new COVID-19 pandemic, and its adverse health consequences. The case highlights that law enforcement agencies recognize the danger to society of fake news and rumors spread on social media.

Where exactly the new boundaries of free speech lie will emerge once the final and binding judgments are available. The first examples include two high-profile cases (in the towns of Gyula and Szerencs) that were launched following communications through Facebook posts. In the Gyula case, the commenter criticized the release of hospital beds, which he said meant "sending dying patients [...] home", according to reports.[53] In Szerencs, in addition to several strong opinions, the author of the post expressed the opinion that Prime Minister Viktor Orbán is deliberately allowing security measures to be relaxed at the peak of the pandemic in order to reduce the budget burden by allowing large numbers of retirees to become infected and "sending thousands to their deaths".[54] The two proceedings were quickly terminated without indictment. According to a statement by the Minister of Justice, Judit Varga, "unfortunately sometimes the authority is wrong";[55] Gergely Gulyás, the Minister of the Prime Minister's Office, stated that "the strength of the rule of law is shown by the fact

50 Criminal Code, Section 338(1): "A person who states or disseminates any untrue fact, which is capable of disturbing the public peace, or pretends that an event resulting in public danger is about to happen, is guilty of a felony and shall be punished by imprisonment for up to three years. (2) The punishment shall be imprisonment for one to five years if the criminal offence of threatening public danger resulted in any serious disturbance of public peace."

51 Tamás Koncz, 'Érthető, miért hallgatott a rendőrség: megszereztük a rémhírterjesztés miatt indított eljárások adatait', *Népszava*, 10 June 2020, at https://nepszava.hu/3081120_ertheto-miert-hallgatott-a-rendorseg-megszereztuk-a-remhirterjesztes-miatt-inditott-eljarasok-adatait.

52 'Jogerősen megrovásban részesítette a Pécsi Járásbíróság a rémhírterjesztőt', *Birosag.hu*, 6 October 2020, at https://birosag.hu/aktualis-kozlemenyek/pecsi-torvenyszek-jogerosen-megrovasban-reszesitette-pecsi-jarasbirosag.

53 Árpád Németh & Ádám Magyar, 'Nem zárult le a rémhírterjesztés miatt előállított momentumos büntetőeljárása', *Euronews*, 14 May 2020, at https://hu.euronews.com/2020/05/14/nem-zarult-le-az-eljarasa-a-remhirterjesztes-miatt-eloallitott-momentumosnak.

54 Dániel Szalay, 'A TASZ jogásza szerint rémisztő, hogy a rendőrség bevitte a kormányfőt bíráló szerencsi férfit rémhírterjesztés vádjával – a hatóság furcsa magyarázatot adott a történtekre', *Media1*, 12 May 2020, at https://media1.hu/2020/05/12/a-tasz-jogasza-szerint-remiszto-hogy-a-rendorseg-bevitte-a-kormanyfot-biralo-szerencsi-ferfit-remhirterjesztes-vadjaval-a-hatosag-furcsa-magyarazatot-adott-a-tortentekre.

55 Judit Varga, 'Előfordul, hogy a hatóság téved', *Mandiner*, 16 May 2020, at https://mandiner.hu/cikk/20200516_varga_judit_elofordul_hogy_a_hatosag_teved.

that the prosecutor's office changed the wrong decision within a few hours".[56] The conclusion in the two cases is that opinions that are harshly critical of the Government and the Prime Minister, accusing decision-makers of indirectly taking human lives, may be freely aired. According to the police and the Government, all of this falls within the framework of the freedom of expression, and in any case is not considered to be scaremongering.

5. Conclusion

Until now, in the absence of substantive case-law, it was only possible to engage in abstract exchanges of views on the crime of scaremongering at the level of principles. It may well be that the COVID-19 pandemic will change this situation, and the publication of untrue allegations, primarily in online social media, could have criminal consequences in cases provided for by the law. It is therefore not futile to prepare for such situations and to clarify what interpretations of the criminal statutory elements emerge from the reasoning of the two related Constitutional Court decisions. In general, it is timely for the case-law to establish specific standards for social media opinions, whether published by non-professional opinion-leaders or by public actors.

It is also important that the case-law on the new statutory elements make it clear from the outset that *public debates and critical opinions may not be stifled* by the prosecution of individuals for scaremongering. This basic premise is clear from the decisions of the Constitutional Court, as is the fact that, in contrast to the situation in the past, scaremongering may now only be punished in special situations, in particularly justified and narrow cases. Although the applicable standard cannot be determined with full accuracy from the decisions analyzed here, it is sufficient to establish these starting points in order to protect the freedom of expression, while the clarification of further details remains a matter for the case-law.

56 Lénárd Sándor, 'Rémhírterjesztésről, alkotmányosan', *Mandiner*, 17 June 2020, at https://precedens.mandiner.hu/cikk/20200617_remhirterjesztesrol_alkotmanyosan.

doi: 10.5553/HYIEL/266627012021009001002