

Decision 3049/2020 (III. 2.) AB

on the dismissal of a constitutional complaint

In the matter of a constitutional complaint, with concurring reasonings by Justices *dr. András Varga Zs., dr. Mária Szívós* and *dr. Béla Pokol* - the Panel of the Constitutional Court adopted the following

decision:

The Constitutional Court hereby dismisses the constitutional complaint seeking a finding of unconstitutionality by non-conformity with the Fundamental Law and annulment of Order No 23.Szk.11.933/2018/5 of Miskolc District Court.

Reasoning

I

[1] 1. The petitioner, acting in person, filed a constitutional complaint to the Constitutional Court based on Section 27 of Act CLI of 2011 on the Constitutional Court (hereinafter referred to as the "Constitutional Court Act"), in which the petitioner sought a finding of conflict with the Fundamental Law of Order No 23. Szk.11.933/2018/5 of Miskolc District Court.

[2] On the basis of the facts of the case underlying the constitutional complaint, with its decision dated 5 June 2018, the administrative infractions authority of first instance imposed a fine of HUF 50,000 on the petitioner for the administrative infraction of disturbance of the peace, against which the petitioner (as the person subject to the proceedings) lodged an objection (requesting a hearing) within the statutory time limit, claiming that the decision imposing the fine violated his right to the free exercise of religion.

[3] At the court hearing, the petitioner maintained his objections. The administrative infraction authority of first instance did not change or revoke the decision concerned by the objection, but forwarded it to the district court of its seat for the purpose of adjudication of the objection [pursuant to Section 106 (2) of Act II of 2012 on Administrative Infractions, the Procedure in Relation to Administrative Infractions and the Administrative Infractions Record System (hereinafter referred to as the "Administrative Infractions Act")]. By its Order No 23.Szk.11.933/2018/5, Miskolc District Court upheld the decision No BO-08/SZABS/4234-13/2018 of Miskolc District Office. In its reasoning of the Order, the court considered the objection to be unfounded, stating that the administrative infraction authority of first instance had clarified the essential circumstances of the case, and had correctly established both the facts of the case and the classification of the act committed by the person subject to the proceedings, and the liability of the person subject to the proceedings. Nevertheless, the court also pointed out in its reasoning that in the case at issue a conflict had arisen between the fundamental right to freedom of religious practice under Article VII (1) of the Fundamental Law

and the right to rest within the fundamental right to physical and mental health under Article XX (1) of the Fundamental Law. It also referred to Article I (3) of the Fundamental Law, pursuant to which fundamental rights may be restricted to the extent strictly necessary and proportionate to the pursued, while respecting the essential content of the fundamental right.

[4] The court stressed that the person subject to the proceedings is entitled to the free exercise of religion; however, this may not entail a violation of the fundamental rights of others. It also stated that it is not about anyone preventing the person being subject to the procedure from carrying out religious acts, such as praying or singing, but making him carry out his activities at a volume that does not disturb others. The person subject to the procedure also argued, on the basis of his objection, that the audio recording made by the complainant could be used in view of the principle of unfettered adduction of evidence, however, the administrative infraction authority based its findings not only on this, but also on additional evidence (the statements of witnesses). The court also found no violation of the law by the district office in imposing the legal sanction, as it was made in its discretion and with the correct application of the law.

[5] Subsequently, the petitioner filed a constitutional complaint directly—albeit belatedly—with the Constitutional Court pursuant to Section 27 of the Constitutional Court Act, and submitted a request for a statement of defence which, in view of performing the omitted act and the petition being suitable for consideration, was accepted by the Constitutional Court in the framework of single judge procedure. The petition, as supplemented in the light of the request of the Secretary General of the Constitutional Court to submit missing documents, claims that the contested judicial decision infringed the petitioner's rights under Article VI (1), Article VII (1), Article XV (2), Article XX (1) and Article XXIV (1) of the Fundamental Law. In his opinion, in assessing the constitutionality of a specific judicial decision, it is a constitutional law issue of fundamental significance whether the fundamental right to freedom of conscience and religion enshrined in Article VII (1) of the Fundamental Law is in fact in conflict with the right to physical and mental health as enshrined in Article XX (1) of the Fundamental Law, as stated in the reasoning of the judicial decision. In the petitioner's view, there is in fact a conflict between the right to freedom of exercising religion as guaranteed by Article VII (1) of the Fundamental Law and the fundamental right to the "domestic tranquility" under Article VI (2) of the Fundamental Law. Furthermore, according to the petitioner, the question of whether the right to freedom of conscience and religion can be restricted in the event of a conflict of these fundamental rights is a constitutional law issue of fundamental importance.

II

[6] The provisions of the Fundamental Law relevant to the petition read as follows:

"Article VII (1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include the freedom to choose or change one's religion or other belief, and the freedom of everyone to manifest, abstain from manifesting, practise or teach his or her religion or other belief through religious acts, rites or otherwise, either individually or jointly with others, either in public or in private life."

"Article XX (1) Everyone shall have the right to physical and mental health."

III

Based on Section 31 (6) of the Rules of Procedure, instead of the decision on admissibility of the complaint, the judge rapporteur may submit to the panel a draft containing the decision on the merits of the complaint. On this basis, no separate decision on admissibility has been adopted in the present case, but the assessment of admissibility has been carried out in this decision on the merits by the Constitutional Court's panel, which also decided on the merits of the case and came to the following conclusions.

[8] On the basis of Section 56 (2) of the Constitutional Court Act, the Constitutional Court primarily examined whether the constitutional complaint had complied with the formal and substantive requirements laid down in the Constitutional Court Act.

[9] In accordance with Section 27 of the Constitutional Court Act, "persons or organisations affected by judicial decisions contrary to the Fundamental Law may submit a constitutional complaint to the Constitutional Court if the decision made regarding the merits of the case or other decision terminating the judicial proceedings

(a) violates the petitioner's right laid down in the Fundamental Law, and

(b) the possibilities for legal remedy have already been exhausted by the petitioner or no possibility for legal remedy is available for him or her".

[10] In accordance with Section 30 (1) of the Constitutional Court Act, the constitutional complaint under Section 27 of the Constitutional Court Act may be submitted within sixty days from the date of service of the challenged decision. In view of the fact that the petitioner's request for a statement of defence related to his belated constitutional complaint was accepted by the Constitutional Court, it is deemed to have been fulfilled in due time pursuant to Section 28 (7) of the Rules of Procedure. The petitioner has exhausted the legal remedies available to him. The Constitutional Court found that the petitioner is the person subject to the main proceedings and can therefore be considered as a person entitled and concerned.

[11] The constitutional complaint shall contain an explicit request within the meaning of Section 52 (1b) (a) to (f) of the Constitutional Court Act. The petitioner indicated the statutory provision establishing the competence of the Constitutional Court (Section 27 of the Constitutional Court Act); indicated the impugned judicial decision; identified Article VII (1) of the Fundamental Law as the provision allegedly violated and claimed the violation of his fundamental right to the free exercise of religion enshrined therein; specified the essence of the violation of this right; and indicated why and to what extent the judicial decision contested by his constitutional complaint violates such right. It also expressly requested the annulment of the challenged judgement.

[12] At the same time, the Constitutional Court also found that the part of the petition claiming that the judicial decision was contrary to the Fundamental Law in violation of Article VI (1), Article XV (2), Article XX (1) and Article XXIV (1) of the Fundamental Law did not meet the

requirement of an explicit request, since in this part the petition did not contain any argumentation concerning the violation of the Fundamental Law by the judicial decision.

[13] In accordance with Section 29 of the Constitutional Court Act, a further condition of the admissibility of the constitutional complaint is to raise the doubt of a conflict with the Fundamental Law substantively influencing the judicial decision or a constitutional issue of fundamental importance. These two conditions are of alternative character, thus the existence of either of them shall form the basis of the Constitutional Court's procedure in the merits of the case {for the first time, see: Decision 3/2013 (II. 14.) AB, Reasoning [30]}.

[14] In this respect, the Constitutional Court found that the case raised a question of fundamental constitutional importance in the context of the right to the free exercise of religion guaranteed by Article VII (1) of the Fundamental Law, which had a substantial impact on the judicial decision, as to whether the right of the petitioner to the free exercise of religion had been infringed by the judicial decision.

IV

[15] The constitutional complaint is unfounded as set out below.

[16] In its review of constitutionality, the Constitutional Court sought to determine whether the petitioner's right to the free exercise of religion, as enshrined in Article VII (1) of the Fundamental Law is infringed by the judicial decision because it ordered the petitioner to pay a fine for the administrative infraction of the disturbance of the peace (upholding the decision of the administrative infraction authority of first instance, which) considered the petitioner's excessively loud prayers as an unjustified disturbance by noise.

[17] Bearing this in mind, the Constitutional Court first provided an overview of its findings of principle in relation to its case law in the context of the freedom of religion.

[18] Article VII (1) of the Fundamental Law establishes the right to freedom of thought, conscience and religion as a fundamental right and defines its content. The four elements of the content of the right to freedom of religion: the freedom to choose, manifest, practise and teach religious beliefs, as summarised by the Constitutional Court in its recent Decision 3192/2017 (VII. 21.) AB (Reasoning [21]).

[19] Most recently, the Constitutional Court in its Decision 17/2017 (VII.18.) AB (Reasoning [23]) also confirmed its previous case law in the context of the individual and collective exercise of the right to the freedom of religion, whereby the State, in the context of individual rights, is obliged, on the one hand, to negative conduct, namely not to restrict the fundamental rights of the individual. At the same time, the State's obligation to respect and protect fundamental rights in relation to religious freedom does not stop at refraining from infringing individual rights, but must also secure the conditions necessary for the exercise of religious freedom, that is, the protection of the values and life situations associated with religious freedom, irrespective of individual needsthat is,.

[20] Subject to these considerations, the right to the freedom of religion also includes the right to conduct one's entire life according to one's faith, and to the functioning of the religious community according to its self-understanding. The freedom of exercising religion means, alongside traditional freedom of worship, a general freedom, the essence of which is the increased protection of conviction-based action.

[21] The Constitutional Court considered these findings in the context of Article VII of the Fundamental Law to be authoritative also in this Decision.

[22] 2. The Constitutional Court subsequently went on to determine whether the court's decision upholding the first instance authority's order to pay the fine for the administrative infraction imposed on the petitioner restricted the petitioner's freedom of exercising religion.

[23] 2.1 Of the four elements of religious freedom, the right to freedom of expression and practice of religious belief is the subject matter of the present review. The freedom to express religious beliefs through religious acts and rituals, in traditional terms, through worship, constitutes a highly protected content of the freedom of religion, as the Constitutional Court has already stated in several decisions {In this respect see: Decision 3192/2017 (VII. 21.) AB, Reasoning [21]}. At the same time, the expression and practice of religious beliefs also encompasses behaviour and activities that fall outside the scope of the protection of the freedom of worship.

[24] 2.2 The general criteria set out in the Fundamental Law for the restriction on the fundamental right allegedly infringed by the petitioner are declared in Article I (1) and Article I (3) of the Fundamental Law. The significance of Article I (1) is that it establishes as a primary obligation the State's duty to actively protect fundamental human rights. However, in its relevant decisions, the Constitutional Court has emphasised the mediating and balancing role of the State in its obligation to actively protect the fundamental rights of individuals, when a conflict of fundamental rights arises in the legal relationship between subjects of the law in such a way that the fundamental right of one individual is threatened by the fundamental right of another individual (competing fundamental rights) {Decision 13/2016 (VII. 18.) AB, Reasoning [50]; Decision 14/2016 (VII. 18.) AB, Reasoning [65]}.

[25] Pursuant to Article I (3) of the Fundamental Law, a fundamental right may only be restricted in order to allow the exercise of another fundamental right or to protect a constitutional value, to the extent that is absolutely necessary, proportionate to the objective pursued, and respecting the essential content of such fundamental right. As explained in the Decision 3/2015 (II. 2.) AB, although this test of the restriction of fundamental rights is first and foremost binding on the legislator, it is also binding on the bodies applying the law, in accordance with their powers. This Article, with due account to Article 28 of the Fundamental Law, "results in the obligation of the courts, during the interpretation of a provision of the law restricting the exercising of a fundamental right, to limit the restricting of the affected fundamental right only to the level of necessary and proportionate interference within the framework of interpretation allowed by the law" (Reasoning [21]).

[26] In the context of this task of the courts, the Constitutional Court {Decision 7/2013 (III. 7.) AB, Reasoning [33]; Decision 3/2015 (II. 2.) AB, Reasoning [20]} has also stated that this did not mean that the courts should base their decisions directly on the provisions of the Fundamental

Law, but only that they should take into account the relevant constitutional aspects when interpreting the applicable legal provisions and applying them to the specific facts.

[27] 2.3 As a result of the final court decision (which upheld the decision of the administrative infraction authority of first instance imposing a fine for the administrative infraction of disturbance of the peace, considering the petitioner's excessively loud prayers as unjustified noise), the petitioner claimed a violation of his right to freedom of religion enshrined in Article VII (1) of the Fundamental Law.

[28] In the reasoning of its Order, the district court referred, among others, to the fact that the right to freedom of thought, conscience and religion enshrined in Article VII (1) of the Fundamental Law may be restricted for the reasons set out in Article I (3) of the Fundamental Law. It also found that in the case at issue, the right of the person concerned to the free exercise of religion conflicted with the right of other people to rest. However, it has also been explained that "it is not about anyone preventing the person being subject to the procedure from carrying out religious acts, such as praying or singing, but making him carry out his activities at a volume that does not disturb others".

[29] 2.4 The Constitutional Court has already explained above that as part of the expression of religious belief, the individual's religious practice is protected (as part of the fundamental right), including the religious rituals (e.g. prayer, singing) performed by the petitioner in the relevant case. Accordingly, the protection of fundamental rights applies to the possibility of carrying out and practising activities of a religious nature and not to be hindered in the performance of these activities. At the same time, the right itself to the free exercise of religion, as a fundamental right, may be restricted to a proportionate extent, if a legitimate reason so requires, according to Article I (3) of the Fundamental Law. In view of the above, in the present case the Constitutional Court had to decide what fundamental rights protection is afforded to the performance of a religious ceremony which disturbs other third parties because of the volume of the ceremony. In other words, whether the court's decision restricted the fundamental right to the free expression and exercise of religious belief by establishing that the volume of the petitioner's prayers, not the activity itself, but its intensity in being loud, was capable of disturbing others and therefore imposing a fine for an administrative infraction.

The Constitutional Court also considered it important to lay down in principle that carrying out a religious rite aloud (as a part of expressing one's religious conviction) is under the fundamental rights protection of the freedom of religion. On this basis, the court in the specific case correctly found that the restriction could be justified by the neighbours' need to relax and ensure the peace and quiet of their homes. At the same time, it should be furthermore examined, by taking into account the circumstances (the place of carrying out the activity, which is, in the particular case, a condominium, its time and duration, the regularity of the activity, the extent and the manner of disturbance, the social customs etc.), whether the exercising of this activity loudly could be regarded as proportionate.

[31] According to the review carried out by the Constitutional Court, no wrong assessment by the court decision, challenged by the constitutional complaint, can be found regarding the conflict of the competing interest.

[32] It is not contrary to Article VII of the Fundamental Law to argue that religious convictions

may be expressed through prayer or singing, but that the excessive loudness of such prayers or singing may in certain cases constitute a disproportionate disturbance of the peace and quiet (and privacy) of others (neighbours). In other words, in this particular case, the expression of the petitioner's religious beliefs in this way is already legitimately restricted by the peace and relaxation of the neighbours in the apartment building, if it is regularly carried out at excessive volume.

[33] The Constitutional Court reaffirms that the peace and the rest of others may legitimately restrict the decision on how to pray, as a part of expressing one's religious conviction, but this shall always require an individual assessment. The Constitutional Court also points out that neither in the present case is it meant to take a position on the beliefs of a religion, including the extent to which the volume of prayer is linked to the central element of the belief. It recognises that in some cases the volume level itself may be part of the sacred rite, in which case the outcome may differ as to whether the court's decision restricted the petitioner's right to exercise religion and, if so, whether it was necessary and proportionate. (This may be the case when the service can only be performed with a higher noise level, such as a procession or bell-ringing for religious purposes.) In these cases, the higher volume is an inherent part of the religious service, therefore their brevity may also serve as a compensation for the disturbance of outsiders. In such cases, the Constitutional Court and the courts must also take Hungarian cultural and civilisational customs into account. In solving the conflict, one should also consider to what extent the religious conviction might be finally violated due to the restriction.

[34] On the basis of the above, the Constitutional Court came to the conclusion in the course of the concrete review of constitutionality that the decision of the court challenged by the constitutional complaint did not result in an unconstitutional restriction of the petitioner's freedom of religion, and did not restrict or prevent the petitioner from praying in the future in a quieter manner but still in accordance with the religious requirements.

[35] 3 The Constitutional Court dismissed the constitutional complaint as the final decision of the court did not establish the violation of fundamental rights alleged by the petitioner.

Budapest, 18 February 2020

Dr. András Varga Zs. Justice of the Constitutional Court, head of panel

Dr. Tünde Handó Justice of the
Constitutional Court

Dr. Dr. Béla Pokol Justice of the
Constitutional Court

Dr. Balázs Schanda Justice of the
Constitutional Court, rapporteur

Dr. Mária Szívós Justice of the
Constitutional Court
Concurring reasoning by Justice Dr. András Varga Zs.

I agree with the operative part of the majority decision and with its reasoning. I would have liked the Decision to have been even clearer about the relationship between the limits of the freedom of religion and the protection of Christian culture, which the Fundamental Law is ordered to protect.

[37] The historicity of our present conception of law and constitutionalism is explicitly based on elements developed by Christian thought. These are, above all, the triad of personal dignity, solidarity and subsidiarity, which are the three pillars of Catholic social teaching, and which have been transferred from here to secular thinking, including the Fundamental Law of Hungary. As part of this, the legal protection of the freedom of religion has also been explicitly shaped by European culture, as a result of a worldview based on Christianity. Therefore, its interpretation is only adequate in the context of the European cultural background, that is, together with the conceptions of society found in the Israelite tradition in the Old Testament and in the Christian one in the New Testament (and obviously in Greek philosophy and Roman private law).

[38] As regards the relationship between church and state, the doctrine of parallel authority comes from the Gospels ("Render unto Caesar the things that are Caesar's, and unto God the things that are God's", Matthew 22:21). A philosophical derivation of this appears in the apologetics of the early Christian era, which does not deny the emperor's right to set the rules of conduct, but explains why Christianity is not contrary to the order of Rome. The doctrine of parallel authority, however, is much older than this, and the Scriptures testify that it has been with Israel essentially throughout its existence.

[39] As the consequence of this, while - at the level of individual fundamental rights - the state and the law are obliged to accept and protect all faiths and religions, at the community level, cooperation between the state and religious communities requires consideration and distinction. Therefore, the state has nothing to do with how a religious community relates to its God, but it has much more to do with how it relates to its emperor, that is, the State.

[40] The Fundamental Law presents this distinction when it orders the protection of Hungary's Christian culture. It is a culture based on the concept of society and the customs of the Old and New Testaments. The exercise of religion shall be judged a certain way, with different limits of religion, if it fits into the tradition and customs thus understood, and differently if it deviates from them.

Budapest, 18 February 2020

Dr. András Varga Zs. Justice of the Constitutional Court

[41] I join the concurring reasoning.

Budapest, 18 February 2020

Dr. Mária Szívós Justice of the Constitutional Court

Concurring reasoning by Justice Dr. Béla Pokol

[42] I support the dismissal found in the operative part of the decision as well as most of the reasoning, but in my concurring reasoning I make an addition the same way as I have already stated my position in the concurring reasoning attached to the Decision 17/2017 (VII. 18.) AB, on which the present decision is based.

[43] The reasoning of the Decision fails to take into account, when defining the state's responsibilities with regard to the fundamental right of freedom of religion, the fact that, according to the extensive experience of recent decades, European societies are most at risk from certain radical sects of the Islamic religion, and their mosques are often breeding grounds for terrorism. Thus, in particular the Salafi mosques can be mentioned here, but also some groups of Wahhabis, and according to intelligence information collected by secret services, the number of members of terrorist groups organised around these mosques is estimated at tens of thousands in Western Europe alone. Thus, I cannot agree with the description found in clause IV/1 of the reasoning (Reasoning [17] et seq.) which omits the defence against this from the activities of state bodies in relation to the exercise of religion. I proposed the following as an addition to this part of the reasoning, and as this did not win the support of the majority, it should now stand here as part of my concurring reasoning: "This protection may not extend to those denominations of particular religions, or certain manifestations thereof, which potentially threaten the fundamental values and norms of European culture. Thus, in particular, the activities of Salafi and similar Islamic movements that threaten Europe's cultural traditions remain outside the scope of the freedom of religion protected by the Fundamental Law."

Budapest, 18 February 2020

Dr. Béla Pokol Justice of the Constitutional Court