

## Decision 6/2021 (II. 19.) AB

### **on a finding of the absence of conformity with the Fundamental Law and the annulment of judgement No Pfv.IV.21.163/2018/4 of the Curia and the judgement No 70.P.22-286/2016/13 of the Budapest-Capital Regional Court**

In the matter of a constitutional complaint, with concurring reasonings by *dr. Ágnes Czine, dr. Attila Horváth, dr. Béla Pokol, dr. László Salamon and dr. Mária Szívós*, Justices of the Constitutional Court, the Constitutional Court, sitting as the Full Court, adopted the following

decision:

The Constitutional Court holds that Judgement No Pfv.IV.21.163/2018/4 of the Curia and Judgement No 70.P.22-286/2016/13 of Budapest-Capital Regional Court are contrary to the Fundamental Law and, therefore, annuls said Judgements.

The Constitutional Court shall order the publication of this decision in the Hungarian Official Gazette.

### Reasoning

I

[1] 1. On the basis of Section 27 of Act CLI of 2011 on the Constitutional Court (hereinafter referred to as the "Constitutional Court Act"), the petitioner in Case No IV/572/2020 (Dr. Gáspár Frivaldszky), by alleging violation of Article IX (4) and (5) of the Fundamental Law, sought in his constitutional complaint a finding of the violation of the Fundamental Law by, and the annulment of, Judgement No Pfv.IV.21.163/2018/4 of the Curia (hereinafter referred to as the "Judgement of the Curia"), while two private individual petitioners in Case IV/706/2020, through their legal representative (Dr. Dávid Sobor, attorney-at-law), in their constitutional complaint of 15 April 2020, alleging infringement of Article II, Article IX (4) to (5) and Article XXVIII (1) of the Fundamental Law, sought a finding of the violation of the Fundamental Law by and the annulment of the same Judgement of the Curia, referred to above, and Judgement No 70.P.22-286 /2016/13 of Budapest-Capital Regional Court of Appeals.

[2] The petitioners brought an action because of an act performed in 2016 at a demonstration against the position taken by the Polish Catholic Church in support of the prohibition of abortion. In their action, they requested the court to declare that through their affiliation with the Catholic religious community, which was an essential feature of their personality, the defendants violated their human dignity and their right to practice their religion freely by presenting a performance, subsequently uploaded to the internet, imitating the Eucharist, in which one protester placed a white pill from a bag labelled "abortion pill" on the tongue of the other two defendants, accompanied by making the statement "the body of Christ". Budapest-Capital Regional Court dismissed the action. Budapest-Capital Regional Court of Appeals, seized

of the matter on the claimants' appeal, reversed the judgement of the first instance court and found that the defendants had violated the claimants' human dignity and right to freedom of religion. Upon the defendants' application for review, in its judgement, the Curia, as the review court, annulled the judgement of second instance and approved the judgement of the court of first instance. In the reasoning, the court argues that in the social debate on the authorisation of abortion, the Church, expressing its views strongly, its members and the faithful of a given religious community must, similarly to public figures, tolerate even strong criticism from a wider audience.

[3] In the petitioners' view, the judgement of the Curia violates their right to human dignity, the constitutional restriction on the exercise of the right to freedom of expression and the right to a fair trial.

[4] 2. With regard to the relation of the subject matter of the cases, the Constitutional Court consolidated the constitutional complaints and adjudicated them in a single procedure on the basis of Section 58 (2) of the Constitutional Court Act.

## II

[5] 1. The provisions of the Fundamental Law referred to in the petitions read as follows:

"Article II Human dignity shall be inviolable. Every human being shall have the right to life and human dignity; the life of the foetus shall be protected from the moment of conception."

"Article IX (4) The right to freedom of expression may not be exercised with the objective of violating the human dignity of others.

(5) The right to freedom of expression may not be exercised with the objective of violating the dignity of the Hungarian nation or of any national, ethnic, racial or religious community. Persons belonging to such communities shall be entitled to enforce their claims in court against the expression of an opinion which violates their community, invoking the violation of their human dignity, as provided for by an Act."

"Article XXVIII (1) Everyone shall have the right to have any indictment brought against him or her, or his or her rights and obligations in any court action, adjudicated within a reasonable time in a fair and public trial by an independent and impartial court established by an Act."

[6] 2. The relevant provisions of Act IV of 2013 on the Civil Code (hereinafter referred to as the "Civil Code") interpreted in the court's judgement are as follows:

"Section 2:54 (5) Any member of the community may enforce his personality rights within a

thirty-day term of preclusion from the occurrence of a legal injury that was committed with great publicity in relation to some essential trait of his personality, his belonging to the Hungarian nation or some national, ethnic, racial or religious community, and is downright offensive to the community or unduly insulting in its manner of expression. With the exception of relinquishing the material gain obtained through the violation of rights, any member of the community may enforce any sanctions of the violation of personality rights."

### III

[7] According to Section 56 of the Constitutional Court Act, the Constitutional Court shall, in its discretion, review the substantive conditions for the admissibility of a constitutional complaint provided for by law, in particular the conditions of concernment under Sections 26 to 27, the exhaustion of legal remedies, and the conditions under Sections 29 to 31.

[8] In the course of the procedure, the Constitutional Court found that the petitions contain a explicit request and comply with the formal and substantive requirements prescribed by law [Section 52 (1b), (5) to (6) of the Constitutional Court Act].

[9] The petitioners put forward two main grounds for the unconstitutionality of the judicial decision(s): First, the courts failed to take into account that the respondents had not expressed a specific opinion by their offensive act; second, the members of the religious community were subject to a heightened duty of tolerance similar to that of public figures.

[10] The petitioner in Case IV/572/2020 received the judgement of the Curia on 2 January 2020, and submitted his petition to the court of first instance on 17 February 2020, within the time limit. In Case IV/706/2020, the legal representative of the petitioners did not take over the decision of the Curia, the presumption of mailing took effect on 13 January 2020, and the petition was filed with the court of first instance on 12 March 2020, also within the time limit. The Constitutional Court has not yet ruled on the compatibility of the contested judicial decision with the Fundamental Law. The petitioners also claim that their rights under the Fundamental Law have been infringed; the infringement arose as a result of the decision on the merits of the case against them; they were claimants in the court proceedings and are therefore considered to be affected. The applicants have exhausted their remedies.

[11] The question of the extent to which persons belonging to a religious community are obliged to tolerate the expression of opinions that offend their religious community is one of fundamental constitutional significance that has a substantial influence on the decision of the court (Section 29 of the Constitutional Court Act).

[12] On the basis of the above, the Constitutional Court, applying Section 31 (6) of the Rules of Procedure, without a separate procedure, admitted the constitutional complaint and rendered a decision on its merits.

#### IV

[13] The constitutional complaints are well-founded.

[14] 1. The Constitutional Court emphasises as a point of departure for its assessment of the constitutional complaint that "the Constitutional Court has consistently held that it does not review whether the evidence and arguments presented in the reasoning of the judicial decision are well-founded, whether the judiciary has correctly assessed that evidence and arguments, and whether the facts established in the specific case as a result of the judicial assessment and the conclusion drawn from them are well founded, just as it does not review whether the interpretation of the law by the courts is correctly in accordance with the accepted rules of legal doctrine." {See Order 3207/2015. (X. 27.) AB, Reasoning [12]; and Order 3067/2016. (IV. 11.) AB, Reasoning [18]; Order 3117/2016. (VI. 21.) AB, Reasoning [16]}. Accordingly, in the present case, the Constitutional Court did not assess whether the specific act of the petitioners as claimants violated the Catholic religious community and, through it, the human dignity of the petitioners. The assessment of these questions is beyond the competence of the Constitutional Court. In the procedure of the constitutional complaint, the Constitutional Court had to interpret the relevant provisions of the Civil Code and the Fundamental Law together and to review to what extent the contested judgement remained within the scope of constitutional interpretation.

[15] 2. Pursuant to Article 28 of the Fundamental Law, in the course of the application of law, courts shall interpret the text of laws primarily in accordance with their purpose and with the Fundamental Law. In the course of ascertaining the purpose of a law, consideration shall be given primarily to the preamble of that law and the justification of the proposal for or for amending the law.

[16] On the basis of the above, the Constitutional Court first reviewed how, in the context raised by the petition, Section 2:54 (5) of the Civil Code should be interpreted in accordance with Article II and Article IX (4) to (5) of the Fundamental Law.

[17] In accordance with Section 2:54 (5) "any member of the community may enforce his personality rights within a thirty-day term of preclusion from the occurrence of a legal injury that was committed with great publicity in relation to some essential trait of his personality, his belonging to the Hungarian nation or some national, ethnic, racial or religious community, and is downright offensive to the community or unduly insulting in its manner of expression."

[18] Section 2:54 (5) of the Civil Code became part of Act on the basis of the proposal for amendment(s) to the Civil Code Draft Act No T/7971. The proposal for amendment No T/7971/215 of the committee proposed the following provision: "any member of the community who suffers harm to a right which affects the personality of an individual is entitled to claim a right of personality, provided that the harm is capable of creating a well-founded sense of threat to the members of the community". Under the reasoning of the proposal, the provision creates the possibility of defence under civil law against collective defamation. However, the final text of the provision, which is in force today, was introduced by the adoption of the proposal for amendment No T/7971/226 before the final vote. On the basis of the explanatory memorandum of the proposed amendment, "the collective protection of personality rights should only be allowed for certain fundamental rights, otherwise freedom of expression would be infringed. Collective protection of personality rights must be limited, that is, it must be ensured that only justified and flagrant violations are sanctioned." The purpose of some of the conditions restricting the possibility of enforcement was defined in the reasoning as follows: "(a) The insertion of the words infringement »in relation to some essential trait of his or her personality« is necessary in order to ensure that only in serious cases and only those who are genuinely part of the community will be protected. (b) The use of the phrase »with great publicity« is intended to keep personal relations and private conversations out of the courtroom in this context. (c) The use of the phrase »downright offensive [...] or unduly insulting in its manner of expression« is necessary because a certain level of criticism must be tolerated by a community. (d) It is necessary to restrict the limitation period of bringing a claim to thirty days because of the risk of bringing lawsuits without limits, since within the limitation period, any member of the community could bring numerous lawsuits under the same legal title. By introducing a time limit, the number of cases can be reasonably limited and the cases can be merged; given that the right sought to be enforced is the same."

[19] The current text of Article IX (4) and (5) of the Fundamental Law was established by the Fourth Amendment to the Fundamental Law of Hungary (25 March, 2013). The reasoning of the Draft Act No T/9929 on the Fourth Amendment to the Fundamental Law of Hungary explains that "[t]he Draft aims at establishing at the level of the Fundamental Law that human dignity may be an external limit to freedom of expression, and at creating the constitutional basis for the possibility of sanctioning certain cases of hate speech by civil law in the event of violations of the dignity of communities. The previous practice of the Constitutional Court in this respect has made it clear that effective action against hate speech cannot be secured at the level of the law, and therefore it is justified to justify it by amending the Fundamental Law.. The Draft lays down the constitutional rules for the development of legal remedies against communications that violate the dignity of the communities listed in the provision. The unified judicial practice of the domestic courts considers an infringement of personality rights to be established only if the identity of the victim can be established directly or indirectly, but individually, from the conduct of the infringer, if a person considers himself to be the recipient of hate speech, but his identity cannot be individually identified on the basis of the hate speech, he is deprived of the possibility of bringing a civil action. The Draft therefore specifies that the right to freedom of expression may not be exercised with the objective of violating the dignity of the Hungarian

nation or of any national, ethnic, racial or religious community. In line with the Draft, claims for the violation of human dignity can be brought before the courts in the case of expressions that offend communities. The Draft will allow victims to bring actions under civil law for violation of their personality rights."

[20] The reasoning of the amendment of the Fundamental Law uses the term "hateful manifestation" alongside the term "hate speech". In this connection, the Constitutional Court points out that, according to its case law, the right to express one's opinion under Article IX (1) of the Fundamental Law "includes acts beyond oral or written communication"; "the expresser of an opinion may communicate his or her ideas not only in words, but also, for example, by using images, symbols or wearing clothing, symbolic speech, manifested in the use of symbols, may be one of the classic issues of freedom of expression [*cf.* most recently: Decision 4/2013 (II. 21.) AB]" {Decision 3089/2019 (IV. 26.) AB, Reasoning [25]}. Just as the means of expression and the scope of the right of expression are broader than verbal expression, Article IX (4) and (5) of the Fundamental Law protects the dignity of individuals and communities against communicative acts other than ordinary "speech". In this context, the Constitutional Court points out that "assessing whether or not the relevant communicative act falls under the scope of freedom of expression, shall require the complex evaluation of several factors. [...] in order to handle an act as an expression of opinion, it is a necessary but never a sufficient precondition that the actor acted for the purpose of expressing his or her opinion, although in the course of assessing an act from the point of view of freedom of opinion, the judiciary should primarily review the objective or the motivation the actor had when he or she performed the conduct. Indeed, for the applicability of freedom of opinion it is also necessary that the selected form of the communication should be objectively suitable for conveying the message. {Decision 1/2019. (II. 13.) AB, Reasoning [36]; Decision 3089/2019. (IV. 26.) AB, Reasoning [26]}

[21] The Constitutional Court has not yet applied Article IX (5) of the Fundamental Law on the merits, but it has already interpreted Article IX (4) in several decisions. Considering that Article IX (4) and (5) of the Fundamental Law were introduced by the same amendment to the Fundamental Law, both provisions, directly or indirectly, have the protection of human dignity as their purpose, and based on the similar wording of the two provisions ("[the] right to freedom of expression may not be exercised with the objective of violating the human dignity of [others or specific communities]"), the Constitutional Court has taken as a point of departure its case law on paragraph (4) when interpreting Article IX (5) of the Fundamental Law.

[22] In its decisions interpreting Article IX (4) of the Fundamental Law, the Constitutional Court has stated that "the protection of honour and reputation, which derive from human dignity [...] constitute a constitutionally justifiable limitation on freedom of expression and thus on speech related to public affairs. It is also clear that anyone who uses seriously offensive or abusive language to humiliate another person's humanity is not exercising their freedom of expression in public affairs. Accordingly, human dignity, which is the direct embodiment of human status, marks the boundary of freedom of debate in public life. Speech debating public affairs must give way to human dignity as an inalienable essence that determines human status." {Decision

13/2014 (IV. 18.) AB, Reasoning [29], Decision 3348/2018. (XI. 12.) AB, Reasoning [26]} According to the case law of the Constitutional Court, "freedom of expression opens the way not only to certain concepts or ideas, but also to the possibility itself of expressing opinion. [...] In order to control public power or those exercising public power and to inform and draw the attention of public opinion, a certain degree of exaggeration and provocation may also be used. This is the very basis of plural and diverse democratic societies. In the light of Article IX (4) of the Fundamental Law, the Constitutional Court, in comparison with the previous case law of the Constitutional Court, emphasises that the limit of freedom of expression is the protection of the honour and reputation of others, which derive from their human dignity. It means that freedom of expression will not provide protection any more for the communications of arbitrary nature that fall outside the scope of discussing public affairs, such as communications related to private or family life, made with the mere purpose of humiliation, the use of aggressive or offensive words or the causing of another injury of rights {cf. [...] Decision 7/2014 (III. 7.) AB, Reasoning [62]}. Nor will it defend an opinion expressed in a public debate if the views expressed therein violate the inalienable core of human dignity and thus amount to a manifest and serious denigration of human status {cf. [...] Decision 7/2014 (III. 1.) AB, Reasoning [60] and [62]}." {Decision 13/2014 (IV. 18.) AB, Reasoning [40]; reinforced in: Decision 3145/2018. (V. 7.) AB, Reasoning [59] and [65]} In a recent decision interpreting Article IX (4) of the Fundamental Law, the Constitutional Court also pointed out that "the provision sets a limit to freedom of expression, but this limit is not an infringement of someone, but an infringement of human dignity. Expressions that are subjectively offensive to the personality, but do not amount to an offence to human dignity, are protected by Article IX of the Fundamental Law." {Decision 3048/2020 (III. 2.) AB, Reasoning [31]}

[23] In the light of the wording and purpose of Article IX (5) of the Fundamental Law and the above-quoted case law of the Constitutional Court, it can be concluded that in order to protect the dignity of the Hungarian nation, national, ethnic, racial and religious communities, freedom of expression and thus speech on public affairs may be constitutionally restricted. Freedom of expression does not extend as far as protecting arbitrary communications about communities that fall outside the scope of public debate and are intended to incite mere hatred, degrade the human dignity of members of the community, use seriously offensive or abusive language or otherwise cause the injury of rights. Exercise of freedom of expression may not be directed to such an end. Nor may the expression of an opinion in a public debate entail a violation of the inalienable core of human dignity, and thus a manifest and serious denigration of the human status of persons belonging to the community.

[24] The limit to freedom of expression is not, however, an affront to a community (or of the individuals belonging to it), but an affront to the dignity of the community. Offending the dignity of a community is not the same as an offence against the community, much less offending the feelings of individual members of the community. The violation of the human dignity of an individual belonging to a community in the very context of his or her belonging to that community naturally results in the violation of the individual's subjective feelings. However, this is not inevitable the other way round: the violation of the subjective value

judgements, emotional orientation or possible sensitivity of a member of the community does not necessarily mean a violation of his or her human dignity or the dignity of the community. Expressions that may subjectively offend individuals belonging to the communities referred to in Article IX (5) of the Fundamental Law, but do not amount to an offence to their human dignity, are protected by Article IX (1) of the Fundamental Law.

[25] Section 2:54 (5) of the Civil Code may be interpreted in accordance with the Fundamental Law in the light of the above findings. In view of the foregoing, a communication can necessarily be classified as "downright offensive" or "unduly insulting in its manner of expression" if it violates the inalienable core of the human dignity of the members of the community or if it is otherwise aimed at arbitrarily violating the dignity of the community or its members.

[26] However, the question of when an opinion expressed for the purpose of discussing a public matter is to be considered "unduly insulting in its manner of expression" requires further assessment. According to a possible approach, the above condition is deemed to be fulfilled if the party expressing the opinion could have sought a form of expression that was neutral or non-offensive to the community in question. However, it is easy to argue against this approach on many grounds. Firstly, it would lead to a disproportionate restriction of freedom of expression if only opinions expressed in the least offensive style and form imaginable were lawful to use. This approach, moreover, disregards the fact that, even in the case of verbal communication, there is a close link between the thought content and the form of the communication, and that, in the case of images and communicative acts, it is the, often inseparable, unity of the two that constitutes the opinion. Thirdly, this approach cannot be supported by the wording of the Act of Parliament, which does not grant protection against all offensive or abusive communications, but only against those that are downright offensive and those that are unduly insulting.

[27] Under another possible approach, in the case of discussing a public issue, especially if the objective is to control public power or those exercising public power and to inform and draw the attention of public opinion, the chosen form and style of expressing an opinion may not be inconsistently or excessively offensive, but criticism, irony, a certain degree of provocation, and, where appropriate, mildly offensive or insulting statements shall remain protected by freedom of expression. This interpretation is in line with the wording of the Act of Parliament, takes into account freedom of style of the party expressing the opinion and does not lead to disproportionate restrictions on freedom of expression. The Constitutional Court also draws the attention of the courts applying the provision to the fact that the message, the objective and the degree of the offensive or harmful character of a given communication need to be assessed with due care, not only in relation to the content and form of the communication in question, but also in relation to the context within the relevant medium and the social environment. If a community in our country has historically suffered serious violations, or is subject to repeated attacks in the present, then the dignity of that community within society may be considered more vulnerable.



[28] With regard to religious communities, the Constitutional Court specifically emphasises that Article IX (5) of the Fundamental Law provides protection not only to religious communities which are in a minority within society, but also to a community whose members may constitute a majority in relation to society as a whole. This also follows from the principles of equality before the law and non-discrimination under Article XV (1) and (2) of the Fundamental Law, which require the law to treat all persons concerned as persons of equal dignity. The Fundamental Law expresses in the National Avowal that "we recognise the role of Christianity in preserving nationhood" and "we value the various religious traditions of our country". With account to this, the dignity of Christian religious communities, regardless of the proportion of the population they represent, undoubtedly also deserves the same level of legal protection as other religious communities.

[29] 3. The Constitutional Court then assessed, in the context of the specific case on which the constitutional complaint is based, on the basis of the constitutional standard described above whether the interpretation of the law found in the challenged judgements is consistent with the protection of the right to human dignity enshrined in Article II and, in this context, Article IX (5) of the Fundamental Law.

[30] The court of first instance dismissed the petitioners' action. Under the judgement, the defendants carried out the challenged activities in the context of a public debate at an event protected by the right of assembly, organised in connection with a public issue, the adoption of an abortion law in Poland. The performance presented at the demonstration was a critique of the Catholic Church's views on abortion, as the Polish Catholic Church has taken a strong stance in the social and political debate surrounding the abortion law in Poland. In the view of the the court, because "the Catholic Church takes a rather strong position in the abortion debate, those who identify with the Catholic religion must tolerate equally strong criticism as well". In the opinion of the court, "[i]n so far as the expression of an opinion is made by rendered of symbolic acts, it is necessary that the symbols of the organisation or community which is the subject of the opinion, in this case the Catholic Church, should be used in the symbolic system of the performance, and therefore the use of clothing and liturgical elements was not an end in itself". The court ruled that "[t]he defendants' intention was not to disparage the Catholic faith, but to make a sharp, mocking criticism of the position of the Catholic Church and the community of believers on the abortion debate, as a form of conduct protected by the right to freedom of expression". The court of first instance finally concluded that "the performance did not constitute a serious offence under Section 2:54 (5) of the Civil Code, nor was it so unjustifiably offensive in its presentation as to justify a restriction of the defendants' right to express their opinions in public debate." {see the judgement of the Curia, Reasoning [6]}.

[31] By its judgement, the court of second instance reversed the judgement of the court of first instance, found an infringement and imposed legal consequences. As a result of its consideration of the conflict and restriction of the fundamental rights at stake in the case, the court of second instance came to the conclusion that "it is also doubtful whether the defendants' conduct can be assessed as an opinion expressed on the issue of abortion". The court stated that "the claimants did not dispute that what is known as the abortion debate is a public debate,

the subject matter of which is the authorisation or prohibition of abortion. Representatives of the Catholic Church are publicly known to oppose and condemn abortion. The defendants were not prevented from expressing their opposing views in the public debate. In this particular case, however, a performance was presented which included shocking, offensive and disturbing content, in a manner evident even for people with little knowledge of Catholic church rituals. The central element of Holy Communion, which is part of the liturgy of the Catholic religion, is when believers receive the body of Jesus Christ in the ceremony. The defendants desecrated the rite of communion when, substituting the wafer symbolising the body of Christ for an "abortion pill", the first defendant placed the pill on the tongue of the second defendant and other participants, accompanied by the statement "the body of Christ", the second defendant accepted the pill in imitation of the believers participating in the rite, while the third defendant assisted in communicating the scene to the public. Such conduct seriously offended the personal character of the members of the Catholic Church, for whom Jesus is life itself and the use of the abortion pill is a sin, a violation of the commandment »Thou shalt not kill«. Judged objectively, the conduct complained of clearly constitutes defamation of religion. At the same time, the taunting act did not show the defendants' position taken on the abortion issue. As part of the performance, the placement of the abortion pill on the tongue to accompany the communication of the body of Christ could not be interpreted as a criticism of the Church's position on the abortion debate. Therefore, »performing the sacrifice« with the abortion pill was expressly considered to be a defamation of the religion of the claimants, which fulfilled the conditions set out in Section 2:54 (5) of the Civil Code, and seriously offended the Catholic community with great publicity." (See the judgement of the Curia, Reasoning [8])

[32] The Curia annulled the final judgement and approved the judgement of the court of first instance. The decision of the Curia, after explaining the applicable provisions of the Fundamental Law and the statutory provisions, as well as the legislative reasoning attached to Subsection (5) of Section 2:54 of the Civil Code, stated that "the defendants, with their contested performance, expressed their views in the social and public debate surrounding the authorisation or prohibition of abortion". According to the court's assessment, "the demonstration against the ban on abortion made it clear to the outside observer that the priest's speech and the scene he was performing must have been interpreted ironically. The defendants have expressed their position against the Catholic Church in the public debate in question by means of mockery"; and "mockery may be a means of expressing an opinion". The judgement also cited several decisions of the Constitutional Court, including Decision 8/2018 (VII. 5.) AB, according to which, "based on their own decisions, the holders of ecclesiastic offices step out of the sphere closely linked to the life of their religious community, and they participate actively in public debates and political life". In its decision, the Curia attached particular importance to the judgement of the European Court of Human Rights (hereinafter referred to as the "ECtHR") in the Case *Otto-Preminger-Institut v. Austria* (13470/87) of 20 September 1994 (hereinafter referred to as the "Otto-Preminger-Institut Case"), which was relied on by both parties in the underlying case.

[33] On the basis of the judgement, the Curia states that, according to the ECtHR, "freedom of expression constitutes one of the essential foundations of a democratic society, it is applicable

not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that shock, offend or disturb the State or any sector of the population. However, exercising this right shall necessarily include an obligation to avoid as far as possible expressions that are gratuitously offensive and do not contribute to freely debate public affairs." According to the Curia, the ECtHR "made the protection of freedom of expression subject to the fulfilment of important criteria to be reviewed, including the fact of contribution to the free discussion of public affairs, the absence of denigration and defamation of religion as an objective in itself, the extent of the publicity and the consideration of specific local and regional factors; by assessing all of these together, the Curia has identified a fundamental difference between the Otto-Preminger- Institute Case and the present case, a difference which in the latter case does not require a restriction by the State of freedom of expression." Based on the above, the Curia, similarly to the court of first instance, took the view that " the Church, its members and, by extension, the members of the religious community concerned, who express their views in a strong manner, are obliged to endure criticism, which is also strong, in the social debate surrounding the authorisation of artificial abortion, in a wider context, in the same manner as public figures, irrespective of the fact that they are not public figures ". The Curia also agreed with the court of first instance that "the use of certain elements of the Catholic rite to express the position taken contrary to the Catholic Church was justified [...] and not self-serving". In assessing the injury of rights, the Curia also took into account, among other things, that "the defendants' conduct did not cause religious unrest, did not incite anti-religious feelings, and had no significant social impact". Based on all the above, the Curia concluded that in the case at hand, "the use of certain liturgical elements by the defendants to express their opinions in the representation of a religious rite may be offensive to members of the religious community concerned, however, since the representation of the ritual was not, according to the objective standard", that is, not "the individual sensitivity of the person concerned" but "the public perception of society", "downright offensive or unduly insulting in its manner of expression, no infringement of rights can be established" (see the Judgement of the Curia, points [13] to [29]).

[34] Based on an assessment of the court decisions, the Constitutional Court finds that the challenged court judgements recognised the fundamental rights context of the case, identified the applicable provisions of the Fundamental Law, took into account the main tenets of the Constitutional Court's case law on freedom of expression, and the Curia also took into account the purpose of Section 2:54 (5) of the Civil Code. The judgements under appeal, in line with what the Constitutional Court has previously stated in this Decision, have established that the purpose of the contested communication, the fact that it is expressed in the context of a public debate and freedom of the party expressing the opinion to choose its style are also relevant for the assessment of the infringement. Both contested judgements held, partly in different wordings, that members of a religious community which is manifesting itself in a public matter must tolerate strong criticism. This interpretation is correct to the extent that " as the focus of political freedom of opinion is primarily on public affairs themselves and not on public actors, all public affairs speeches are subject to enhanced protection ", and therefore, in a given case, the discussion of public affairs may, to the extent of the specific social debate, concern a range

of individuals wider than that of public figures {cf. Decision 7/2014 (III. 7.) AB, Reasoning [57]}. It follows from the foregoing that assessments and criticisms affecting the religious community in a public issue may, by implication, naturally affect members of the religious community who are not involved in that public debate. It cannot be justified, however, that the dignity of members of a religious community in general, by virtue of their very membership of the community, should be protected by the law with the same restrictions as the personality rights of the representatives of the religious community who engage in public affairs {cf. Decision 8/2018 (VII. 5.) AB, Reasoning [24]}. The Constitutional Court also draws attention to the fact that public figure politicians are also entitled to the protection of personality if the value judgement concerns their private or family life {cf. Decision 7/2014 (III. 7.) AB, Reasoning [62]}; likewise, members of religious communities are not obliged to tolerate communications that insult or offend, as an objective in itself, the beliefs, rituals and practices of their community, regardless of debating public affairs. Agreeing with the findings of the court decisions in the present case, the use of symbols of a religious community in the context of criticism of the religious community in the discussion of public affairs, in particular when expressing an opinion through visual or communicative acts, is not inherently self-serving and unlawful (the petitioners have not even challenged the lawfulness of the critical performance in general). At the same time, as the Constitutional Court has previously held, in the case of non-verbal expressions, the application of freedom of expression requires that "the form of communication chosen must be objectively suitable as an instrument or a medium for conveying ideas." {Decision 3089/2019 (IV. 26.) AB, Reasoning [26]}.

[35] The judgement of the court of second instance cast doubt on whether the defendants' conduct complained of ("communion" with the abortion pill) could have been interpreted as a position taken by the defendants on abortion or as criticism of the Church's position. The judgements of the court of first instance and the Curia comprehensively assessed the defendants' entire presentation as the discussion of a public matter and did not review the content of the specific challenged conduct. Whereas in assessing a disputed communication the context of the communication provides a point of reference, the use of an otherwise offensive or abusive expression does not render lawful its communication in the context of a social debate if it does not carry a valuable opinion or if it does not consistently fit into the debate. In such cases, in the absence of any other identifiable purpose, there is also the possibility that the communication may in fact be intended to offend the dignity of the community concerned, which is expressly prohibited by the Fundamental Law; but even in the absence of such an intention, it may be considered to be unduly insulting.

[36] With regard to the foregoing, the Constitutional Court notes that in the Otto- Preminger-Institut case, as also cited by the Curia, the ECtHR required that the exercise of freedom of expression "should avoid, as far as possible, expressions which are unnecessarily offensive and do not contribute to the free discussion of public affairs"; however, the challenged court judgements did not review whether these criteria were met in relation to the conduct that was substantially complained of. Summing up, the challenged judgements acknowledged the existence of the offence suffered by the petitioners through their religious community; at the

same time, they accepted the offensive communication as a constitutionally protected expression of opinion, without examining the content of the opinion of the specific conduct actually complained about or its contribution to the discussion of a public affair; consequently, they have not (could not have) assessed with due care whether or not the communication at issue was intended to offend the community concerned; and with regard to offensive communication, they stated that members of the religious community were subject to an enhanced tolerance obligation similar to that of public figures. As a result, the protection of the dignity of the petitioners' religious community was undermined, without any justification for doing so in terms of the exercise of freedom of expression.

[37] Based on the above, the Constitutional Court found that the judgement of the Curia and the judgement of the court of first instance violated the petitioners' right under Article II in conjunction with Article IX (5) of the Fundamental Law, and therefore annulled the judgements under Section 43 (1) and (4) of the Constitutional Court Act.

[38] The Constitutional Court repeatedly stressed that due to the limitations of its competence, the Constitutional Court did not establish in its decision whether or not the specific act complained of in the present case seriously harmed or unjustifiably offended the Catholic religious community and, through it, the human dignity of the petitioners. Considering the historical facts as a whole, it will be for the courts to assess these issues, and to determine the legal consequences in the event of a violation, in the judicial proceedings to be conducted as a result of this decision; however, pursuant to Section 43 (3) of the Constitutional Court Act, constitutional issues must be addressed in accordance with this Decision.

[39] 4. As explained in detail in the reasoning of this Decision, the Constitutional Court emphasises that if an institutionalised religious community expresses its opinion on a public issue, the opinion of the religious community is also open to challenge, and even if the criticism takes the form of mockery, it is constitutionally protected. However, a distinction should be made between criticising the religious community and mocking religion itself. Expressions of opinions that mock religious beliefs, religious symbols, religious acts or rituals may be restricted in order to protect the dignity of the religious community or its members, on the basis of Article IX (5) of the Fundamental Law.

[40] The Constitutional Court reiterates that freedom of expression and freedom of the press, as well as freedom of conscience and freedom of religion, are among the fundamental values of European civilisation and the Hungarian constitutional tradition. In applying Section 2:54 (5) of the Civil Code, the courts and, as the supreme judicial body, the Curia, and ultimately the Constitutional Court, regarding the issue of interpretation in accordance with the Fundamental Law, are responsible for maintaining public discourse at the midline of fairness and moderation that ensures both the democratic discussion of public affairs and the peaceful coexistence of religious communities in society.

[41] 5. The Constitutional Court ordered the publication of the decision in the Hungarian

Gazette pursuant to the second sentence of Article 44 (1) of the Constitutional Court Act in order to promote the development of a judicial practice in accordance with Article IX (5) of the Fundamental Law.

Budapest, 2 February 2021

*Dr. Tamás Sulyok,*  
Chief Justice of the Constitutional Court

Dr. Tamás Sulyok, Chief Justice of the Constitutional Court on behalf of Justice dr. Ágnes Czine prevented from signing

Dr. Tamás Sulyok, Chief Justice of the Constitutional Court on behalf of Justice dr. Tünde Handó prevented from signing

Dr. Tamás Sulyok, Chief Justice of the Constitutional Court on behalf of Justice dr. Ildikó Hörcherné dr. Marosi prevented from signing

Dr. Tamás Sulyok, Chief Justice of the Constitutional Court on behalf of Justice dr. Miklós Juhász prevented from signing

Dr. Tamás Sulyok, Chief Justice of the Constitutional Court on behalf of Justice dr. Salamon László prevented from signing

Dr. Tamás Sulyok, Chief Justice of the Constitutional Court on behalf of Justice dr. Szabó Marcel prevented from signing

Dr. Tamás Sulyok, Chief Justice of the Constitutional Court on behalf of Justice dr. Egon Dienes-Oehm prevented from signing

Dr. Tamás Sulyok, Chief Justice of the Constitutional Court on behalf of Justice dr. Attila Horváth prevented from signing

Dr. Tamás Sulyok, Chief Justice of the Constitutional Court on behalf of Justice dr. Imre Juhász prevented from signing

Dr. Tamás Sulyok, Chief Justice of the Constitutional Court on behalf of Justice dr. Pokol Béla prevented from signing

Dr. Tamás Sulyok, Chief Justice of the Constitutional Court on behalf of Justice dr. Balázs Schanda prevented from signing

Dr. Tamás Sulyok, Chief Justice of the Constitutional Court on behalf of Justice rapporteur dr. Péter Szalay prevented from signing

Dr. Tamás Sulyok,  
Chief Justice of the Constitutional Court  
on behalf of Justice  
dr. Szívós Mária prevented from signing

Concurring reasoning by Justice *Dr. Ágnes Czine*

[42] I concur with the decision laid down in the operative part, but I consider it important to highlight the following points.

[43] Article IX (5) of the Fundamental Law, as supplemented by the Fourth Amendment to the Fundamental Law, makes it clear that "the right to freedom of expression may not be exercised with the objective of violating the dignity of the Hungarian nation or of any national, ethnic, racial or religious community." The purpose of this provision is to provide a constitutional basis for the sanctioning, with the instruments of civil law, of certain cases of hateful manifestations in the event of the violations of the dignity of communities. The amendment to the Fundamental Law was necessary because "the Constitutional Court's previous case law in this area has made it clear that effective action against hate speech cannot be ensured at the level of the Act of Parliament" (see the reasoning to the proposed fourth amendment to the Fundamental Law).

[44] The special significance of Article IX (5) of the Fundamental Law lies in the fact that it provides a constitutional background for the restriction of freedom of expression in cases where it is embodied in hateful manifestations. However, this does not mean a loss of the highly protected fundamental right character enjoyed by freedom of expression.

[45] According to the case law of the Constitutional Court, which has been uninterrupted for decades, freedom of expression is a constitutional value that enjoys priority protection. In democratic states under the rule of law, it is a fundamental requirement that all citizens in society should be free to express their ideas and to shape public opinion. Without freedom and diversity of social and political, that is, public debate, there is no free public opinion and no democratic rule of law {Decision 7/2014 (III. 7.) AB, Reasoning [39]}. Already in its early practice, the Constitutional Court has stressed that freedom of expression is a key guarantee for the development and maintenance of democratic public opinion, which is also an indispensable source of a pluralist society. [Decision 30/1992 (V. 26.) AB, ABH 1992, pp 167,170 to 171].

[46] In the light of the cited case law of the Constitutional Court, the criteria of interpretation, developed in the present case, which may result in a restriction of freedom of expression are therefore of particular importance.

[47] Also in the context of Article IX (5) of the Fundamental Law, primarily it is necessary to decide whether the given communication reflects the expression of a position in public affairs, a position expressed in a public debate, that is, whether it is related to the free discussion of public affairs. To assess this, the manner of presenting the communication, its circumstances and the subject of the opinion, its social context are to be reviewed.

[48] On the basis of these considerations, I hold that in the present case the Constitutional Court has correctly concluded that the contested judgements are contrary to the Fundamental Law. The courts did not give sufficient weight to the social context of the communication at issue and did not consider to what extent the defendants' conduct affected or offended the dignity of the Catholic community. The defendants' challenged conduct used a central element of the liturgy of the Catholic religion to convey an opinion in a public debate. However, the courts did not review whether the conduct of the defendants was capable of conveying the position taken in the relevant public debate.

Budapest, 2 February 2021

*Dr. Tamás Sulyok*, Chief Justice  
of the Constitutional Court  
on behalf of Justice *dr.*  
*Ágnes Czine* prevented from signing

Concurring reasoning by Justice *Dr. Béla Pokol*

[49] I supported the annulment stated in the operative part of the decision, but I could not accept part of the reasoning, therefore I explained my position in a concurring reasoning.

[50] In my view, the point of departure of the reasoning is incorrect when it states that if the prohibition of a conduct is laid down by an ordinary legislative Act and above it also by the regulation of the Fundamental Law, as in the present case □-, then the review by the Constitutional Court would not extend to examining the conduct in question as this would be left exclusively to the competence of the ordinary court. In comparison, in my view, although in such a case the facts of the conduct and the evidence thereof must indeed be reviewed in their entirety only by the ordinary court, the Constitutional Court must also review the framework of the facts of the constitutional norm in the light of the fundamental right it guarantees, if necessary, and cannot be prohibited from doing so. Thus I consider the initial part of the reasoning in clause IV/1 (Reasoning [14]) to be completely wrong.

[51] As a consequence, I would not have found a violation of the Constitution because the challenged judicial decisions "accepted the offensive communication as a constitutionally protected expression of opinion, without examining the content of the opinion of the specific conduct actually complained about or its contribution to the discussion of a public affair; consequently, they have not (could not have) assessed with due care whether or not the communication at issue was intended to offend the community concerned" (see clause IV/3 of the reasoning, Reasoning [29] et seq.) This argument implicitly relativises the possibility of infringing religious communities, if their contribution to the discussion of the public issue at stake could be established. By contrast, in my view, the Constitutional Court should now have stated in principle that the symbols and liturgical procedures essential to the belief systems of individual religious communities should not be mocked, even in the course of debating public affairs. Knowing that with this formula, the Constitutional Court would recognize a great difference between religious communities, because there is indeed a great difference between religious communities in the use of visual symbols and liturgical procedures by their religious belief systems. For example, the differences between the various Protestant churches and the Catholic Church are obvious here, but the increased sensitivity of the Islamic religion to the sanctity of its symbols is a daily source of controversy in the countries of Western Europe, nevertheless, these controversies could spill over to us, and this must be taken into account in the course of laying down the current formula.



Budapest, 2 February 2021

*Dr. Tamás Sulyok*, Chief Justice of the  
Constitutional Court on behalf of  
Justice *dr. Béla Pokol* prevented from signing

[52] I join the concurring reasoning.

Budapest, 2 February 2021

Dr. Tamás Sulyok, Chief Justice of the  
Constitutional Court on behalf of Justice dr.  
Attila Horváth prevented from signing

Dr. Tamás Sulyok, Chief Justice of the  
Constitutional Court on behalf of Justice dr.  
László Salamon prevented from signing

*Dr. Tamás Sulyok*,  
Chief Justice of the Constitutional Court  
on behalf of Justice  
*dr. Mária Szívós* prevented from signing