

Decision 23/2021 (VII. 13.) AB

on rejecting the constitutional complaint to establish a conflict with the Fundamental Law and annul certain provisions of the Government Decree No. 484/2020. (XI. 10.) on the second phase of protective measures applicable during the period of state of danger and on setting a constitutional requirement

The plenary session of the Constitutional Court, in the subject of a constitutional complaint – with concurring reasoning by Justices *dr. Attila Horváth, dr. Ildikó Hörcherné dr. Marosi, dr. Miklós Juhász, dr. Balázs Schanda and dr. Péter Szalay* and dissenting opinions by Justices *dr. Ágnes Czine dr. Egon Dienes-Oehm, dr. Tünde Handó, dr. Imre Juhász and dr. Mária Szívós* – adopted the following

decision:

1. The Constitutional Court – acting *ex officio*, in the context of the law reviewed and applicable in the judicial proceedings – establishes that it is a constitutional requirement originating from the joint interpretation of Article VIII (1) and Article 54 (1) of the Fundamental Law that the law-maker may suspend the exercise of the right of assembly, even in period of a state of danger, only for the time and within the scope strictly necessary, by examining at reasonable intervals whether the circumstances giving rise to the restriction still justify the suspension of the fundamental right or a restriction of its scope to an extent exceeding the provisions laid down in Article I (3) of the Fundamental Law.

2. The Constitutional Court rejects the motion to establish a conflict with the Fundamental Law and annul the text “and the assembly” in section 4 (1), in force until 22 May 2021, of the Government Decree No. 484/2020. (XI. 10.) on the second phase of protective measures applicable during the period of state of danger.

3. The Constitutional Court rejects the motion to establish a conflict with the Fundamental Law and annul the text “and assembly” in section 5 (1) and the second sentence of section 5 (2) of the Government Decree No. 484/2020. (XI. 10.) on the second phase of protective measures applicable during the period of state of danger.

The Constitutional Court orders the publication of its decision in the Hungarian Official Gazette.

Reasoning

I.

[1] 1. Based on section 26 (1) and (2) of the Act CLI of 2011 on the Constitutional Court (hereinafter: ACC), the petitioner Szivárvány Misszió Foundation filed a constitutional complaint, in which it requested the declaration of the conflict with the Fundamental Law and the annulment of section 4 (1) and section 5 (1) and (2) of the Government Decree No. 484/2020. (XI. 10.) on the second phase of protective measures applicable during the period of a state of danger (hereinafter: Decree). According to the petitioner, the relevant provisions of the Decree violate the right to peaceful assembly granted in Article VIII (1) of the Fundamental Law.

[2] 2. In the case giving rise to the petition, the petitioner intended to organise an event – subject to the Act LV of 2018 on the Right of Assembly (hereinafter: ARA) – on 10 December 2020 from 17:00 to 19:00 hours at the Id. Antall József embankment in front of the Parliament building at Kossuth Lajos tér 1-3. in District 5 of Budapest. The Budapest Police Headquarters, complying with its obligation to inform the petitioner pursuant to section 11 of the ARA, informed the petitioner that, in line with the mandatory provisions of sections 4 and 5 of the Decree, no assembly could be held, and therefore it could only issue a decision prohibiting the assembly. As the regulations are mandatory, the police headquarters could not examine the health risks of holding the event.

[3] The petitioner turned to the Curia against the prohibiting decision. It stressed that the holding of the assembly could not pose a risk from the point of view of the epidemic situation, because it would have taken place in closed vehicles and in compliance with the epidemiological rules (use of masks). The Curia dismissed the petitioner's action in its judgement No. K. II.40.446/2020/2. According to the core content of its decision, "in an assembly case, a prohibiting decision based on a provision of the law prohibiting the holding of assemblies in a state of danger is lawful. The general prohibition precludes the assembly authority from considering the specific circumstances of the individual case."

[4] 3. Following the decision of the Curia, the petitioner turned to the Constitutional Court. In the petitioner's opinion, the right to peaceful assembly guaranteed by Article VIII (1) of the Fundamental Law was violated as a result of the Decree, because although it is generally acceptable that the law-maker restricts the holding of events in view of the risk of epidemics, but in the petitioner's case the assembly authority prohibited a demonstration which was completely risk-free from the point of view of the risk of epidemics. In view of the extended state of danger, the exercise of the freedom of assembly by the petitioner – and reasonably by everyone else – is completely excluded, regardless of the epidemiological risk that the exercise of this freedom entails.

[5] In the petitioner's view, the Fundamental Law does not give the Government a completely free hand to restrict fundamental rights even in a situation of danger, since the restrictions must comply with Article 53 (2) in this case, too. Under the provisions of the Fundamental Law setting the Government's powers to issue decrees, the Government may indeed restrict the right of assembly by decree in a state of danger, but only in accordance with the rules laid down in the cardinal Act.

[6] The petitioner refers to the fact that, according to the Fundamental Law, the measures applicable in a state of danger are limited by the Act CXXVIII of 2011 on Disaster Management and the Amendment of Certain Related Acts (hereinafter: ADM). Under section 49 (3) of the ADM, "in a state of danger, it may be ordered that the police may prohibit the holding of an event or public assembly in a public place if the interests of protection are violated". According to the petitioner, these requirements were not complied with in three respects: (1) no consideration was given to the "interest of protection", i.e. whether the measure served the objective pursued (in this case, the control of an epidemic), (2) the event was not prohibited by the police but by the normative provisions of the Decree, and (3) the prohibition applies not only to public assemblies (held in public places) but to all assemblies in general.

[7] Overall, the petitioner's position is that the restriction of Article VIII (1) of the Fundamental Law in the case giving rise to the petition was not purposeful, and it was unnecessary and disproportionate. The petitioner also noted that there is no constitutionally justifiable reason for the law-maker to make an exception to the prohibition of assembly in some cases (funerals, exercise of religious freedom, sporting events), while not making such exception in the case of other assemblies (gatherings) protected under the Fundamental Law.

[8] The petitioner cited as the legal basis of its constitutional complaint primarily section 26 (1) of the ACC, and secondarily section 26 (2) of the ACC, since the violation of rights occurred as a result of the enactment of the legislation, even without a judicial decision. The petitioner did not seek the annulment of the decision of the Curia.

[9] Following the filing of the petition, the Government repealed section 4 of the Decree. Given that the petitioner filed a complaint on the basis of section 26 (1) of the ACC, the Constitutional Court examined the law in force at the time of the submission of the petition and applied in the case giving rise to the petition.

II.

[10] 1. The relevant provisions of the Fundamental Law:

"Article I (3) The rules relating to fundamental rights and obligations shall be laid down in an act of Parliament. 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, proportionately to the objective pursued, and respecting the essential content of such fundamental right."

"Article VIII (1) Everyone shall have the right to peaceful assembly."

[11] 2. The relevant provision of the Decree in force at the time of submitting the petition:

"Section 4 (1) It is prohibited to gather or assemble on public ground or in public places."

"Section 5 (1) It is prohibited – with the exception under section 6 – to organise or hold an event or assembly."

(2) It is prohibited to stay at the venue of an event – with the exception set out in section 6 – regardless of the venue of the event. It is prohibited to stay at the venue of an assembly.”

III.

[12] As provided in section 56 (1) of the ACC, the Constitutional Court first examined the existence of the statutory conditions for the admissibility of the constitutional complaint.

[13] 1. Pursuant to Article 24 (2) (c) of the Fundamental Law, a person or organisation affected by an individual case may lodge a constitutional complaint with the Constitutional Court if, as a result of the application of a law contrary to the Fundamental Law in the court proceedings in the case, a) his or her right guaranteed by the Fundamental Law has been infringed, and b) the possibilities for legal remedy have already been exhausted or no possibility of legal remedy is available for the petitioner.

[14] According to section 30 (1) of the ACC, constitutional complaints are to be submitted in writing not later than 60 days of serving the challenged decision. The decision of the Curia was received by the petitioner on 15 December 2020, and the petitioner sent its constitutional complaint to the Constitutional Court on 8 February 2021, within the deadline. The petitioner acted in its own case, through its legal representative, and made an explicit request for the annulment of the Decree.

[15] 2. The petition indicated the petitioner's entitlement and the statutory provision justifying the Constitutional Court's competence [section 51 (1) and section 52 (1b) a) of the ACC]; the procedure of the Constitutional Court was requested in the competence laid down in section 26 (1) of the ACC. The petitioner also indicated the statutory provision to be reviewed by the Constitutional Court [section 52 (1b) c) of the ACC], and the violated provisions of the Fundamental Law [section 52 (1b) d) of the ACC]. The petitioner justified the starting of the procedure, it explained the essence of the violation of the rights granted in the Fundamental Law and referred to in the petition [section 52 (1b) b)], and it provided reasons why the challenged provision is contrary to the relevant provisions of the Fundamental Law [section 52 (1b) e)]. The petitioner submitted an explicit request for the annulment of the challenged provision [section 52 (1b) (f)].

[16] 3. The issue raised in the constitutional complaint – the exercise of the freedom of assembly in the period of a state of danger – is closely linked to the right guaranteed by Article VIII (1) of the Fundamental Law and as such is a matter of fundamental constitutional importance.

[17] 4. The constitutional complaint under section 26 (2) of the ACC is of complementary character as compared to the constitutional complaint under section 26 (1) of the ACC, which is against a judicial decision based on a law that is contrary to the Fundamental Law. Given that a court decision was made in the petitioner's individual case, the Constitutional Court examined the constitutional complaint within the framework of section 26 (1) of the ACC.

[18] In view of the state of danger, the Constitutional Court considered the petition out of turn, in line with section 16 (5) (a) of the Rules of Procedure.

IV.

[19] The constitutional complaint is unfounded.

[20] 1. According to Article VIII (1) of the Fundamental Law, everyone shall have the right to peaceful assembly. In its Decision 3/2013 (II.14.) AB, the Constitutional Court confirmed the previously established case-law of the Constitutional Court, according to which "the right of assembly is part of the freedom of expression in a broader sense, ensuring the peaceful collective expression of opinions on public affairs. The constitutional protection thus applies to events aimed at participation in public debate on public affairs, which facilitate the acquisition and sharing of information of public interest and the collective expression of opinions [Decision 55/2001. (XI. 29.) AB, ABH 2001, 442, 449; Decision 75/2008. (V. 29.) AB, ABH 2008, 651, 662 to 663]. Whether an event concerns a public affair, and consequently whether it constitutes an assembly within the meaning of the Fundamental Law, depends on the content, form and context of the opinion that is intended to be expressed." (Reasoning [39]) In another decision, the Constitutional Court has pointed out that "the distinctive communicative function of assemblies [...] is that they allow participation in the discussion of public affairs in a way that can give an emphasis greater than any other form to the opinions expressed." {Decision 30/2015. (X. 15.) AB, Reasoning [25]}.

[21] It follows from the case-law of the Constitutional Court that, conceptually, the right of assembly covers any group-communication aimed at expressing a point of view on a public issue. Article VIII (1) of the Fundamental Law protects not only demonstrations in the traditional sense, but also other events with a communicative content. In view of this, it can be concluded that the event organised by the petitioners, during which they wanted to express their common opinion on a public issue by sitting in a car, holding a banner and honking their horns, constitutes an exercise of freedom of assembly, and the decision of the Curia affected the petitioners' relevant right.

[22] 2. The Constitutional Court first had to examine whether the contested provision of the Decree complies with the conditions for a restriction of fundamental rights.

[23] Article 54 (1) of the Fundamental Law provides that under a special legal order, the exercise of fundamental rights – with the exception of the fundamental rights provided for in Articles II and III, and Article XXVIII (2) to (6) – may be suspended or may be restricted beyond the extent specified in Article I (3).

[24] In this respect, the Fundamental Law allows two types of interference in the exercise of fundamental rights. On the one hand, it provides for the possibility to suspend the exercise of fundamental rights, which is essentially a strong restriction that temporarily completely prevents the exercise of the fundamental right. A less severe restriction is when the law-maker

may restrict the exercise of a fundamental right beyond the limits set out in Article I (3). In both cases, the suspension or restriction may last no longer than the conditions for the imposition of the extraordinary legal order are fulfilled and the extraordinary legal order has also been promulgated. In this respect, the guarantee of proportionality – which is expressly and compellingly set out in Article 54 (3) of the Fundamental Law – is therefore realised in the conceptually definite temporality of the measure. It is the duty of the law-maker to decide whether the conditions for imposing the special legal order exist and, at the same time, whether and to what extent a restriction of fundamental rights is justified in a regime under such a legal order.

[25] Article 54 (1) of the Fundamental Law, however, does not provide the law-maker with unlimited mandate. It follows from the very fact that the operation of the Constitutional Court cannot be restricted during the special legal order [Article 54 (2)], that the Fundamental Law provides for constitutional control also at the time of a special legal order. As pointed out in the Decision 15/2021. (V. 13.) AB: “it was not the intention of the constitution-making body to authorise the law-maker during a special legal order either to impose a restriction on a fundamental right that is not linked to the control of the danger, or to restrict certain fundamental rights more than is justified by the exceptional circumstances. Unlimited or unrestricted power is inherently contrary to the spirit of the Fundamental Law, even during a special legal order.” (Reasoning [33]) In the case in question, the Constitutional Court concluded that the “rule restricting a fundamental right in the government decree on the state of danger may be made subject to a substantive constitutional review.” (Reasoning [37]). In times of special legal order, the law-maker may, pursuant to Article 54 (1) of the Fundamental Law, and apart from the exceptions provided for therein, take exceptional measures which temporarily entail the complete suspension of the exercise of a fundamental right. The expediency of such provisions cannot be challenged by the Constitutional Court, however, it is a question of constitutionality whether the restriction of rights remains within the framework of the Fundamental Law.

[26] Generally speaking, the fight against the coronavirus epidemic, including the reduction of its health, social and economic effects, and the mitigation of damages are objectives that constitutionally justify the restriction of fundamental rights, including the restriction of the freedom of assembly. The restriction of the fundamental right therefore has a constitutionally justifiable, legitimate aim.

[27] As regards the necessity of the restriction of the fundamental right, the Constitutional Court's position is as follows: Fighting the coronavirus pandemic entails restrictions on the exercise of a number of fundamental rights. The rules laid down in the Fundamental Law applicable to a special legal order empower the Government during the state of danger to determine the measures necessary to overcome the emergency and restore normal functioning. During a state of danger, the political control over these measures is exercised by the National Assembly, while their constitutional control is performed by the Constitutional Court, whose operation may not be restricted even in a period of a special legal order [Article 54 (2) of the Fundamental Law].

[28] It is primarily a question of expediency to assess what measures are necessary to combat the coronavirus epidemic. The Constitutional Court has neither the power nor the means to review this. By considering the health, social and economic risks, the Government has the power and responsibility to introduce the necessary extraordinary measures, which are directly authorised by the Fundamental Law in times of a state of danger. However, the Government's scope of powers to take extraordinary measures is not unlimited. It follows directly from the fact that the Fundamental Law stipulates that the operation of the Constitutional Court cannot be restricted even in times of special legal order that the purpose of the Fundamental Law is to ensure that special legal order measures are also subject to constitutional control. In the course of the constitutional review, the Constitutional Court may not examine the expediency of the restrictions, but it can examine whether the rule restricting the fundamental right is justified with account to defence against the danger. In the framework of the examination, the Constitutional Court must ascertain whether the challenged regulation is suitable to prevent or mitigate the circumstances giving rise to the introduction of the special legal order. If the appropriateness of the measure is not justified, the suspension or restriction of the fundamental right does not meet the requirements derivable from Articles 54 (1) and I (3) of the Fundamental Law.

[29] Based on the Fundamental Law, the Government is free to decide whether to prohibit, in the context of protection against the epidemic, the assembly, gathering of persons in the same place and at the same time. Nor is it conceptually inconceivable that the spread of an epidemic could pose such a risk that it would require the temporary restriction of all social contact except for interactions essential for subsistence.

[30] The exercise of the right to assembly presupposes, except in exceptional cases, the presence of people in the same time and place, which entails an epidemiological risk. It should also be borne in mind that the number of people actually attending an assembly can only be estimated in advance: since anyone is free to join an event, the possibility that the number of people attending the assembly may be higher (perhaps several times the number originally planned) cannot be excluded, which in turn increases the epidemiological risk. That is why, under the current rules, even a small gathering can become a mass gathering, multiplying the risk.

[31] The right of assembly is one of the most important fundamental political rights and a cornerstone of any democratic society. On the other hand, the pandemic has claimed thousands of lives, destroyed health and caused incalculable economic and social damage. Protecting against this, and minimising the risks as far as possible, is a prominent, constitutionally justified goal of the state. Although it would be an exaggeration to state that all fundamental rights must be fully respected in order to protect against an epidemic, in the present case, the temporary exclusion of the freedom of assembly, one of the riskiest fundamental rights in the context of the spread of the epidemic, can be considered a necessary restriction.

[32] 3. In the case of a complaint based on section 26 (1) of the ACC, the Constitutional Court must primarily decide whether the law applied in an individual case is in conformity with the Fundamental Law from the point of view raised by the petitioner. The Constitutional Court's

task in the present case was therefore not to decide whether there was an epidemiological risk of participants sitting next to each other in a car for the purpose of expressing political opinions. In the framework of the petition, the Constitutional Court could decide whether the rule prohibiting assemblies in general remained within the limits of the Fundamental Law in the given circumstances.

[33] The Constitutional Court is the principal organ for the protection of the Fundamental Law [Article 24 (1) of the Fundamental Law]. It cannot take over the tasks and responsibilities of epidemic control from the Government, its task is to protect the Fundamental Law, including individual rights. In its role as a defender of fundamental rights, it must also take into account the circumstances relevant to the exercise of the fundamental right. In the case underlying the petition, the petitioners intended to organise a demonstration on 10 December 2020. No conflict with the Fundamental Law by the rule that excluded assemblies in general during this period, when the new wave of the epidemic was on the rise, can be verified. On this ground, the Constitutional Court rejected the petition submitted under section 26 (1) of the ACC.

[34] 4. The Constitutional Court notes that a necessary restriction on the freedom of assembly for legitimate purposes is also only compatible with the Fundamental Law if the rule restricting the fundamental right is proportionate. The proportionality of the rules is particularly important in terms of the time: the longer the period of suspension of the exercise of a fundamental right, the stronger justification is needed for maintaining the restriction. The law-maker must recurrently consider – as it does in other cases – the collision between the exercise of the fundamental right and the achievement of the epidemiological objectives, and, where the epidemiological objectives permit, allow at least partial scope for the exercise of the fundamental right.

[35] The Constitutional Court stresses that, in the context of epidemic control, it is for the Government to decide what measures are appropriate. It can also decide to maintain restrictions on the right of assembly if there are justifiable grounds. However, it is a question of constitutionality whether the law-maker, in formulating the rules, has carried out the evaluation of the collision of fundamental rights. Failure to do so will result in a disproportionate restriction of the fundamental right, which will lead to the annulment of the rule.

[36] During the state of danger, the law-maker must constantly monitor whether the general suspension of a fundamental right is indeed an indispensable instrument for achieving the objectives pursued by the special legal order. It is not the declaration of the state of danger, but the specific circumstance giving rise to the state of danger that justifies the restriction of fundamental rights. The complete exclusion of the exercise of a fundamental right cannot be justified on the basis of the danger alone, but it must be decided on a recurring basis whether the circumstances actually justify the suspension of the fundamental right.

[37] According to section 46 (3) of the ACC, in the procedure carried out in the course of exercising its competences, the Constitutional Court may specify constitutional requirements – that result from the Fundamental Law's regulation and that enforce the provisions of the Fundamental Law – the law reviewed and applicable in the court procedure has to comply with.

Decision 8/2021 (III. 2.) AB pointed out that a constitutional requirement can also be addressed to the law-maker, as the Constitutional Court is the supreme body for the protection of the Fundamental Law and it is ultimately responsible for ensuring that legislation is implemented in accordance with the Fundamental Law. (Reasoning [174]). Going beyond the individual case, the Constitutional Court considered it important to point out in general the conditions under which restrictions on the freedom of assembly are compatible with the Fundamental Law during a state of danger.

[38] 5. The Constitutional Court ordered the publication of the Decision in the Hungarian Official Gazette on the basis of section 44 (1) of the ACC.

Budapest, 22 June 2021

Dr. Tamás Sulyok
President of the Constitutional Court

Dr. Tamás Sulyok
President of the Constitutional Court
on behalf of
Justice dr. Ágnes Czine
unable to sign

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on behalf of
Justice dr. Dienes-Oehm Egon
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Justice dr. Béla Pokol
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on behalf of
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on behalf of
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Dr. Tamás Sulyok
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Justice dr. Mária Szívós
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Justice dr. Péter Szalay
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